









THE  
PRACTICE  
OF  
**The Court of King's Bench,**  
IN  
PERSONAL ACTIONS, AND EJECTMENT,

---

BY JOHN FREDERICK ARCHBOLD, ESQ.  
BARRISTER AT LAW.

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**The Third Edition.**

TREATING INCIDENTALLY OF  
THE PRACTICE  
OF  
**The Courts of Common Pleas and Exchequer,**  
BY  
**THOMAS CHITTY, Esq.**  
OF THE INNER TEMPLE.

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VOL. II.

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LONDON:  
S. SWEET, CHANCERY LANE;  
STEVENS AND SONS, BELL YARD, TEMPLE BAR;  
*Law Booksellers & Publishers:*  
AND R. MILLIKEN AND SON, DUBLIN.

1834.

LONDON:

W. M'DOWALL, PRINTER, FEMBERTON ROW,  
COUGH SQUARE.

## TABLE OF CONTENTS.



### BOOK II.

#### PART I.

	<i>Page</i>
Proceedings upon pleas in abatement . . . . .	469—474

#### PART II.

Proceedings upon demurrer . . . . .	475—481
-------------------------------------	---------

#### PART III.

##### *Proceedings upon nul tiel record.*

Ch. 1. When a record of the same court is pleaded . . . . .	482—484
2. When a record of another court is pleaded . . . . .	485

#### PART IV.

##### *Proceedings upon Judgment by Confession or Default.*

Ch. 1. Judgment by confession . . . . .	486—491
2. Judgment upon a warrant of attorney . . . . .	492—502
3. Judgment by default . . . . .	503—507
4. Writ of inquiry	
Sect. 1. Writ of inquiry in ordinary cases . . . . .	508—520
2. Reference to the master . . . . .	520—522
3. Writ of inquiry in debt on bond . . . . .	522—527

# Table of Contents.

## BOOK III.

### PART I.

#### *Proceedings in particular Actions.*

#### CHAPTER 1.

##### *Ejectment.*

Sect. 1.	Proceedings in ejectment in ordinary cases . . . . .	528—556
2.	_____ upon a vacant possession . . . . .	556—558
3.	_____ by landlord for nonpayment of rent . . . . .	559—563
4.	_____ by landlord under stat. 1 <i>Geo. 4</i> , c. 87, upon the determination of a tenancy . . . . .	563—568
5.	_____ by landlord under stat. 1 <i>Will. 4</i> , c. 70, ss. 36, 37 . . . . .	568—575
6.	Action for mesne profits . . . . .	571—577

#### CHAPTER 2.

##### *Replevin.*

Sect. 1.	The distress . . . . .	573—576
2.	Replevin . . . . .	577—592

#### CHAPTER 3.

##### *Scire Facias.*

Sect. 1.	Scire facias, and in what cases it is requisite . . .	598—610
1.	_____ to revive a judgment after a year and day . . . . .	599—601
2.	_____ upon the death of parties . . . . .	601—605
3.	_____ upon the marriage of a feme plaintiff or defendant . . . . .	605—606
4.	_____ in case of bankruptcy or insolvency . . . . .	606—607
5.	_____ on a judgment in debt on bond . . . . .	607—608
6.	_____ on a judgment <i>quando</i> , &c. against an executor . . . . .	608
7.	_____ in other cases . . . . .	609—610
Sect. 2.	Proceedings upon a <i>scire facias</i> . . . . .	610—616

## PART II.

*Proceedings in Actions by and against particular Persons.*

1. Proceedings against peers and members of parliament.	
Sect. 1. Proceedings against, in ordinary cases	617—618
2. Proceedings against members of parliament subject to the bankrupt laws ..	618—619
2. Proceedings by and against corporations and hundredors.	
Sect. 1. Proceedings by and against corporations .....	620—621
2. Proceedings against hundredors .....	621—628
3. Actions by and against attornies and officers of the court, and against the marshal.	
Sect. 1. Actions by attornies and officers .....	629—630
2. Actions against attornies and officers ..	631—633
3. Actions against the marshal for an escape, &c. ....	633—634
4. Proceedings by and against prisoners.	
Sect. 1. Proceedings against prisoners in the custody of the marshal .....	635—644
2. Proceedings against prisoners in the custody of the sheriff. ....	644—646
3. Proceedings by prisoners .....	646—660
1. Discharge by supersedeas .....	649—653
2. Discharge under the insolvent acts	653—659
3. Discharge by other means .....	659—660
5. Actions by and against executors or administrators.	
Sect. 1. Actions by executors or administrators	661—663
2. Actions against executors or administrators .....	663—668
6. Actions against an heir or devisee, on the bond, &c. of his ancestor.	
Sect. 1. Actions against heirs .....	669—672
2. Actions against devisees .....	672
7. Actions by and against infants.	
Sect. 1. Actions by infants .....	673—675
2. Actions against infants .....	675—677
8. Actions by and against baron and feme.	
Sect. 1. Actions by baron and feme .....	678—679
2. Actions against baron and feme .....	679—681
9. Actions by and against bankrupts or their assignees.	
Sect. 1. Actions by bankrupts or their assignees	682—685
2. Actions against bankrupts or their assignees .....	685—689
10. Actions by and against idiots and lunatics .....	690
11. Actions against justices of peace, constables, &c. ..	691
12. Actions against clergymen .....	695—696
13. Actions by paupers .....	697—698.

# Table of Contents.

## BOOK IV.

### PART I.

#### *Proceedings incidental and collateral to the Action.*

Ch. 1. Entry of process on the roll, to save the statute of limitations.....	699—701
2. Outlawry.	
Sect. 1. Outlawry upon mesne process.....	702—709
2. ————— final process .....	710
3. Reversal, &c. of outlawry .....	710—713
3. Removal of prisoners into the custody of the marshal.....	714—717
4. Removal of causes from inferior courts.....	718—723
5. Claim of <i>conusance</i> .....	724—725
6. Change of venue .....	726—731
7. Striking out counts, &c.....	732—733
8. Consolidating actions .....	734—735
9. Payment of money into court .....	736—744
10. Staying proceedings.....	745—755
11. Relief against adverse claims made on sheriffs and other persons .....	756—761
12. Security for costs .....	762—764
13. Oyer of deeds, &c. ....	765—768
14. Copies and inspection, &c. of instruments.....	769—772
15. Particulars of demand or set off.....	778—779
16. Compounding penal actions.....	780—781
17. Setting aside proceedings for irregularity .....	782—787
18. Judgment of <i>nonpros</i> .....	788—792
19. Discontinuance.....	793—795
20. <i>Cassetur breve</i> .....	796
21. Putting off the trial .....	797—800
22. Trial by proviso .....	801—802
23. Costs for not proceeding to trial.....	803—804
24. Judgment as in case of a nonsuit.....	805—810
25. <i>Nolle prosequi</i> and <i>retrazit</i> .....	811—814
26. <i>Remittitur damna</i> .....	815
27. New trial.....	816—830
28. Amendment.	
Sect. 1. Amendment, &c. generally .....	831—835
2. ————— in particular cases..	835—851
29. Arrest of judgment.....	852—853
30. Costs.....	854—868
31. Entry of suggestions on the roll .....	869—875
32. Death, bankruptcy, &c. of parties .....	876—880
33. Motions and rules .....	881—893
34. Summons and orders .....	894—898
35. Affidavits .....	899—905

## *Table of Contents.*

### **PART II.**

#### *Arbitration.*

Sect. 1. The reference.....	906—911
2. The award, &c. ....	911—918
3. Setting aside the award .....	918—925
4. Enforcing performance of the award.....	925—929

### **PART III.**

<i>Attachment</i> .....	930—937
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### **VOL. I.**

Table of Cases .....	vii
——— Rules .....	lv
——— Statutes .....	lxi
Addenda et Corrigenda .....	lxxi
Rules of Court, H. T. 4 W. 4 .....	lxxii



The Publishers respectfully request those gentlemen who purchased the first impression of the First Volume of the present edition of this work, to cancel the under-mentioned pages, and to instruct their bookseller or binder to insert, in lieu thereof, those delivered with this Volume:—

<i>Pages</i>	5 to 8	<i>Pages</i>	217 & 218
	13 to 16		223 to 232
	25 & 26		255 to 262
	31 & 32		281 to 286
	37 to 42		303 & 304
	45 & 46		315 to 324
	59 & 60		329 to 332
	83 & 84		335 & 336
	87 to 94		343 & 344
	99 & 100		347 & 348
	107 to 112		355 & 356
	121 & 122		373 to 380
	141 to 144		385 to 398
	149 & 150		409 & 410
	153 to 158		417 to 424
	161 to 168		427 to 434
	177 to 178		441 to 444
	181 & 182		447 & 448
	187 & 188		457 to 462
	191 to 198		467 & 468
	203 to 214		

## BOOK II.

### PART I.

#### PROCEEDINGS UPON PLEAS IN ABATEMENT, &c.

*Plea &c.*] WHEN the plaintiff has delivered or filed his declaration, the defendant, having appeared, may plead either to the jurisdiction, or in abatement, or in bar. The proceedings upon pleas in bar have already been fully considered in the last book; we shall now treat of those upon pleas to the jurisdiction and pleas in abatement.

It may be as well to premise, that by the late stat. 3 & 4 W. 4, c. 42, s. 8, "no plea in abatement for the *nonjoinder* of any person as a *co-defendant*, shall be allowed in any Court of common law, unless it shall be stated in such plea, that such person is *resident within the jurisdiction of the Court*, and unless the *place of residence* of such person shall be stated with convenient certainty in an *affidavit* verifying such plea." And, "to any plea in abatement in any Court of law of the nonjoinder of another person, the plaintiff may reply, that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors." (*Id.* s. 9). And sect. 10 enacts, "that in all cases in which *after such plea* in abatement the plaintiff shall, without having proceeded to trial upon an issue thereon, commence *another action* against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable, as a contracting party or parties, the plaintiff shall, nevertheless, be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in

abatement the nonjoinder of such person; provided, that any such defendant who shall have so pleaded in abatement, shall be at liberty, on the trial, to adduce evidence of the liability of the defendants named by him in such plea of abatement."

Also, as regards pleas in abatement for a *misnomer*, the 3 & 4 Will. 4, c. 42, s. 11, enacts that no such plea shall be allowed in any personal action, but that, in all cases in which a *misnomer* would, but for this act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a Judge's summons, founded on an affidavit of the right name; and, in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the Judge shall think fit. Sect. 12 also allows the plaintiff to use the initials of the defendant's name, in actions upon written instruments wherein the defendant has used those initials. (*See the enactment, ante, Vol. 1, p. 99*).

In ejectment, the defendant, according to the terms of the consent rule, can plead the general issue only; he cannot, under any circumstances, plead in abatement; and if he wish to plead to the jurisdiction, it is necessary that he should previously obtain the leave of the Court to do so (*a*).

The defendant, if he intend to plead in abatement or to the jurisdiction, must file his plea with the clerk of the papers, on or before the fourth day inclusive, after the delivery, or filing and notice of the declaration (*b*); as, if the declaration be delivered on a Monday, the defendant must plead on or before the Thursday following. But, if Sunday happen to be the last of the four days, the defendant is at liberty to plead upon the Monday (*c*). And the defendant is not bound to plead on any day between the 10th August and 24th October. (*See 2 W. 4, c. 39, s. 11*): and in case the time for pleading has not expired before the 10th August, the defendant has the same number of days for pleading, after the 24th October, as if the declaration had been delivered or filed on the 24th October; but in such a case, there will be no occasion to have a second rule to plead, reply, &c. (*R. M. 3 W. 4, reg. 12*). Where two actions had been vexatiously brought for the same cause, the Court allowed the defendant to plead in abatement, even after the four days had elapsed (*d*), and leave has been given to plead the nonjoinder of a co-contractor, after the four days, that being considered a plea in abatement more to be favoured than those which constitute a mere formal objection (*e*). It may be here observed, that the doctrine of imparlance, from term

(a) *Deighton v. Foster*, Barnes, 187; *Roman v. Norright*, Id. 194; *Williams v. Keen*, 1 W. Bl. 197; and see *Doe d. Rust v. Roe*, 2 Bur. 1046; *Hatch v. Cannon*, 3 Wils. 51; *Doe d. Duchess of Hamilton v. Robinson*, 2 Str. 1120.

(b) See *Jennings v. Webb*, 1 T. R. 277;

*Harbord v. Perigal*, 5 T. R. 210; *Long v. Müller*, 1 Wils. 23, 2 Stra. 1191, S. C.

(c) *Lee v. Carlton*, 3 T. R. 642; *R. E. 5, A. (a)*.

(d) *Sawter v. Dunston*, 1 M. & R. 503, 510. See *Milner v. Milnes*, 3 T. R. 632.

(e) See Chit. Sum. Pract. 130.

to term, is, it seems, done away with by the 2 W. 4, c. 39, s. 11, in actions commenced by the process prescribed by that act. If the defendant plead in abatement or to the jurisdiction, either wholly or in part, after the time here mentioned, without leave of the Court or a Judge, the plaintiff may treat the plea as a nullity, and sign judgment at the expiration of the time allowed for pleading (f).

The defendant must of course enter a common appearance in non-bailable actions, or in bailable cases must put in bail, before he can be allowed to plead in abatement or to the jurisdiction (g); but it is not necessary that he should justify his bail before he pleads; for, if that were the case, the plaintiff would, in most cases, have it in his power to prevent him from pleading such a plea, by not excepting to the bail until the four days had expired (h). The plea cannot be filed before the plaintiff has declared (i); and where the declaration has been filed, the plea cannot be filed before the defendant has taken the declaration out of the office (k).

The plea to the jurisdiction must be pleaded in person, and not by attorney (l). If a feme covert plead her coverture in abatement, she must plead it in person (m); but in all other cases, pleas in abatement may be pleaded either by attorney or in person, in the same manner as pleas in bar (n).

Pleas in abatement are not amendable, because they are dilatory, and do not go to the merits of the action (o).

The plea in abatement and plea to the jurisdiction, like all other dilatory pleas, must be verified by affidavit (4 A. c. 16, s. 11) (p); such as a plea of privilege (q), of infancy (r), nonjoinder (s), or the like. And the affidavit verifying a plea of nonjoinder of a co-defendant, must state the place of residence of such party with convenient certainty. (3 & 4 W. 4, c. 42, s. 8). If the matter of the plea appear upon the face of the record, an affidavit to verify it is unnecessary (t). This affidavit may be made either by the defendant or a third person (u). It must not be sworn before the declaration is filed or delivered; if it were, and it refers, as it usually does, to the declaration,

(f) *Brandon v. Payne*, 1 T. R. 689; R. E. 5 A.; *Martindale v. Harding*, 1 Chit. Rep. 716; *Nolleken v. Severn*, 1 Dowl. P. C. 320, 2 C. & J. 333, S. C.

(g) *Saunders v. Owen*, 2 D. & R. 252; *Wakefield v. Marien*, 2 Chit. Rep. 8.

(h) *Dimsdale v. Nielson*, 2 East, 406; *Cassen v. Bond*, 2 Y. & J. 531; *Hopkinson v. Henry*, 13 East, 170.

(i) *Douglas v. Green*, 2 Chit. Rep. 7; and see *Bower v. Kemp*, 1 Dowl. P. C. 281, 1 C. & J. 287, S. C.

(k) *Bond v. Smart*, 1 Chit. Rep. 735; *Douglas v. Green*, 2 Chit. Rep. 7; but see *White v. Dent*, 1 B. & P. 341, ante, Vol. 1, 206.

(l) *Gilb. C. B.* 187; 1 Bac. Abr. 2; *Grant v. Sondes*, 2 W. Bl. 1094.

(m) 2 Saund. 209 a.

(n) *Id.*; and see further, 1 Chit. Pl. 5th ed.

(o) *Cas. Prac. C. P.* 29; *Tidd*, 9th ed. 638.

(p) As to the certainty required in the affidavit, see *Pearce v. Davy*, 1 Ld. Ken. 304, Say. 293, S. C. An affidavit that the plea is a true plea will not suffice; *Onslow v. Booth*, 2 Stra. 705.

(q) *Stiles v. Mead*, 2 Str. 738; *Cunningham v. Johnson*, Say. 19.

(r) *Pr. Reg.* 5.

(s) *Id.* 4.

(t) *Hughes v. Alvarez*, 2 Ld. Raym. 1409; *Pr. Reg.* 5; *Gray v. Sidneff*, 3 B. & P. 397.

(u) *Pr. Reg.* 5, 6; *Lumley v. Foster*, Barnes, 344; 2 Saund. 211 f. See the form, Chit. Forms, 353.

the plaintiff might treat the plea as a nullity (x). But where the affidavit was sworn in Liverpool, the very day the declaration was filed in London, the Court held that the plea was not a nullity (y). If the plea be filed without an affidavit, or with an insufficient affidavit, to verify it, the plaintiff may treat it as a nullity and sign judgment (z); but he cannot, it seems, get it set aside (a): no judgment of *nonpross* could be regularly signed for not replying to it (b), and the plea is such an absolute nullity that the defect cannot be waived (b). Where the affidavit was sworn before the defendant's attorney, the Court held that the plaintiff could not treat the plea as a nullity on that account and sign judgment, although, probably, it might be a sufficient ground for setting it aside (c). When ancient demesne is pleaded, the affidavit must state that the lands in question are holden of a manor which is ancient demesne, that the party has a freehold interest in it, and that there is a court of ancient demesne regularly holden (d).

Engross the plea on plain paper, and get it signed by counsel (e); write your affidavit on plain paper (f); annex it to the plea, and file them with the clerk of the papers, as directed Vol. 1, 208 (g). If not filed within the time above mentioned, the clerk of the papers should not receive it; if filed after that time, the plaintiff may, as we have seen, *ante*, 471, sign judgment. We have also seen, *ante*, 471, that if the declaration has been filed, the defendant must take it out of the office before he pleads, otherwise the plaintiff may sign judgment.

*Replication, &c.*] When the plea is filed, the plaintiff replies or demurs to it, in the same manner as to a plea in bar. The Court will not, in general, quash the plea upon motion, however defective (h). A demurrer to a plea in abatement need not specially show the causes of demurrer (i).

If you cannot confess and avoid the plea, or deny it, or cannot safely demur to it, you should then enter on the roll a *cassetur breve*, as directed *post*, Book 4, Part 1, Chap. 20; and upon which neither party will be entitled to costs. As to bringing another action after a plea in abatement for nonjoinder, see *ante*, 469.

(x) *Bower v. Kemp*, 1 Dowl. P. C. 206, 1 C. & J. 217, 1 Tyrw. 260, S. C.; *Johnson v. Popplewell*, 2 C. & J. 545.

(y) *Lang v. Comber*, 4 East, 348; and see *Beckett v. Barnard*, 4 M. & Sel. 332.

(z) *Chumley v. Broom*, Carth. 402; *Sherrin v. Alvarez*, 1 Str. 639; *Hughes v. Alvarez*, 2 Ld. Raym. 1409; and see *Lang v. Comber*, 4 East, 348; *Poole v. Pembrey*, 1 Dowl. P. C. 693.

(a) *Bray v. Haller*, 2 Moore, 213; *Rex v. Cooke*, 2 B. & C. 618; and vide *Forther v. Shelton*, 1 Str. 638; *Cunningham v. Johnson*, Say. 19, 293; *Rex v. Grainger*, 3 Bur. 1617; *Poole v. Pembrey*, 1 Dowl. P. C. 693.

(b) *Garratt v. Hooper*, 1 Dowl. P. C. 28. The judgment was set aside with-

out costs.

(c) *Horsefall v. Matthewman*, 3 M. & Sel. 154.

(d) *Doe d. Rust v. Rowe*, 2 Bur. 1048.

(e) See the form of a plea of nonjoinder, Chit. Forms, 353.

(f) See the form, Chit. Forms, 353.

(g) See *Jennings v. Webb*, 1 T. R. 276.

(h) *Rex v. Cooke*, 2 B. & C. 618, 4 D. & R. 114, S. C. See, as to the replication, &c., Vol. 1, 211, &c. See form of a replication to a plea of nonjoinder, Chit. Forms, 353. As to the demurrer and proceedings thereon, see *post*, 475; and as to the issue, &c., see Chit. Forms, 354.

(i) *Lloyd v. Williams*, 2 M. & Sel. 484.

*Issue, Judgment, &c.*] If issue in fact be joined between the parties, the paper book is made up and they proceed to trial, as in ordinary cases (*k*). So, if there be a demurrer and joinder, the subsequent proceedings to judgment exclusive are the same as in ordinary cases, and as mentioned *post*, 475 to 480 (*l*).

Judgment for the plaintiff upon verdict is peremptory, *quod recuperet* (*m*); and therefore care must be taken at the trial, in cases where damages are the principal object of the action, that the jury (if they find for the plaintiff) assess the damages; otherwise, as an omission in this respect cannot be supplied by a writ of inquiry, a *venire de novo* must be awarded (*n*). Judgment for the plaintiff upon demurrer, or on replication of *nul tiel record*, is not final, but merely a *respondeas ouster* (*o*).

Judgment for the defendant, in all cases, whether upon verdict, demurrer, or *nul tiel record*, is, that the writ be quashed (*p*); unless where the matter pleaded in abatement is some temporary disability, such as infancy, &c., in which case the judgment is, that the plaintiff remain without day until, &c. (*q*).

*Costs.*] Upon a *cassetur breve* entered by plaintiff, neither party is entitled to costs (*r*). If there be a verdict for the plaintiff upon a plea in abatement, as the judgment in that case is peremptory, *quod recuperet*, he is, of course, entitled to costs as in other cases; or, if he be nonsuit, the defendant will be entitled to costs (*s*). \* Formerly, neither the plaintiff nor defendant was entitled to costs on a judgment on demurrer to a plea, &c., in abatement (*t*); but now, by the 3 & 4 W. 4, c. 42, s. 34, either party succeeding on such a demurrer will be entitled to his costs, as in other cases. It seems, that, if the defendant have judgment on verdict, he will be entitled to his costs (*u*). See further as to costs, *post*, Book 4, Part 1, Chap. 30.

*Subsequent proceedings.*] After judgment of *respondeas ouster*, the defendant has four days to plead (*y*). This, however, it seems, is in the discretion of the Court (*z*); and it is said, that the Court will sometimes order the defendant to plead *instante* or on the morrow (*a*).

(*k*) See the form of the issue, notice of trial, *Nisi Prius* record, jury process, *postea*, judgment, and execution, Chit. Forms, 354, 355.

(*l*) See Chit. Forms, 359 to 362.

(*m*) *Eichorn v. Lemaitre*, 2 Wils. 367; Gilb. C.B. 53; *Bowen v. Shapcott*, 1 East, 542.

(*n*) *Eichorn v. Lemaitre*, 2 Wils. 367; *Forrest v. Tyemaine*, 2 Saund. 211, (n. 3), *post*, 512.

(*o*) *Tompson v. Collier*, Yelv. 112; *Barber v. Forrest*, 1 Str. 532; *Bowen v. Shapcott*, 1 East, 542; and see *Anon.* 1 Wils. 302. See the forms, Chit. Forms, 364.

(*p*) Gilb. C. B. 52. See the forms, Chit. Forms, 355, 365.

(*q*) Tidd, 642. See, upon this subject, Com. Dig. Abatement, I. 14, 15.

(*r*) Pr. Reg. 6.

(*s*) Ca. Pr. C. B. 35.

(*t*) *Garland v. Exton*, 2 Ld. Raym. 992, 1 Salk. 194, S. C.; *Thomas v. Lloyd*, 1 Ld. Raym. 336, 1 Salk. 194, S. C.; and see *Michlam v. Bate*, 8 B. & Cres. 642, 3 M. & Ry. 91, S. C.

(*u*) *Sed vide Barber v. Palmer*, 6 T.R. 524; *Query*, as to the costs on a *nul tiel record*; see 1 Salk. 194, Ld. Raym. 992, 336.

(*y*) 1 Sellon, 275; *Cantwell v. Earl Stirling*, 8 Bing. 177, 1 M. & Scott, 365, 1 Dowl. P.C. 265, S. C.

(*z*) Comb. 19.

(*a*) Tidd, 641.

The order invariably to be observed in pleading is thus :

- I. To the jurisdiction.
- II. In abatement.
  1. To the person.
    1. Of the plaintiff.
    2. Of the defendant.
  - II. To the count.
  - III. To the writ.
    1. To the form of the writ.
    2. To the action of the writ.
- III. In bar of the action (b).

Pleading a plea in any one of these classes is deemed an acknowledgment that you have no ground for pleading a plea in any of the preceding classes, and a waiver of your right to do so. Therefore, after a judgment of *respondeas ouster*, you cannot plead a plea in the same or in any preceding degree or class with that which you have already pleaded ; but you may plead one in any of the subsequent classes you please (c).

In making up the second issue or paper book, you must enter the plea in abatement and the subsequent proceedings to the judgment of *respondeas ouster*, and then enter the second plea, &c. ; all which must appear in the *Nisi Prius* record, as well as in the issue roll (d). But where the plea in abatement and the proceedings thereon had been omitted, the Court held that there was no ground for arresting the judgment, or for a new trial ; and that, at all events, the defendant had waived the irregularity by accepting the issue (e).

(b) Co. Lit. 303.

(c) See Com. Dig. Abatement ; 2 Saund. Rep. 5 ed. 40, 41.

(d) *Dobberten v. Chancellor*, 1 Ld.

Raym. 329, Carth. 447 ; *Addington v. Oakley*, 5 Mod. 399 ; *Anon.* 7 Mod. 51.

(e) *Combe v. Pitt*, 3 Bur. 1682.

## BOOK II:

## PART II.

## PROCEEDINGS UPON DEMURRER.

*Demurrer and joinder.*] LET the draft of the demurrer, whether general or special, be signed by counsel. (R. E. 18 C. 2). Engross it on plain paper; and if it be a special demurrer, or a general demurrer after a special plea, file it in the office of the clerk of the papers, who will make out a copy of it for the opposite attorney, if required; but a general demurrer, in all other cases, is to be delivered to the attorney of the opposite party, and not filed (a).

If the plaintiff demur, he may at once add the joinder in demurrer, and proceed to make up the demurrer book; so if the defendant demur, the plaintiff never files or delivers a joinder, but merely adds it in making up the demurrer book. (Vol. 1, 213). If the defendant, however, demur, and the plaintiff will not join in demurrer, the defendant's attorney may get a rule to join in demurrer from the master, on the back of the demurrer; take it to the clerk of the rules, who will enter it, and will mark on the back of the demurrer "Entered;" pay him 6d. Then serve a copy of it on the plaintiff's attorney or agent (b). This rule expires in four days exclusive after service; and if a joinder be not delivered or filed within that time, the defendant may sign judgment of nonpros. (See Vol. 1, pp. 212, 214). Or, if the defendant wish the demurrer to be argued, he may make up the demurrer book, adding the joinder, and deliver it to the plaintiff's attorney, with a rule to enter the issue. (See Vol. 1, p. 221).

Where the defendant demurs, and a writ of inquiry is necessary in the event of a judgment for plaintiff, plaintiff may, on the back of the joinder in demurrer, give a notice of executing a writ of inquiry; and where the plaintiff demurs, he may, on the back of such demurrer, give such a notice. (R. H. 2 W. 4, r. 59) (c). In most cases, especially where there is no argument to be had on the demurrer, it

(a) H. 1817, MS. B. 1358. See the forms of demurrers, and joinders thereto, Chit. Forms, 356, 357.

(b) See the form of the rule, Chit.

Forms, 358; and copy, *Id.*

(c) See the former practice and old rules, Tidd, 9th ed. 574. See a form of notice, Chit. Forms, 418, No. 14.



is advisable to give this notice, as it may materially expedite plaintiff's execution, in the event of a judgment in his favour.

*Demurrer book.*] The demurrer book is made up on plain paper, in the same manner as is directed Vol. 1, p. 214, with respect to the issue. Where all the pleadings have been regularly delivered to the attorneys and ought not to have been filed, and in the case of a demurrer upon a writ of error, *scire facias*, or *audita querela*, (R. T. 12 W. 3, a), the demurrer book is made up by the attorney. But in all cases where any of the pleadings have been filed with the clerk of the papers, he makes up the demurrer book, upon being furnished with a copy of the declaration, and of any of the pleadings which have not been filed with him; pay him 8d. per folio for the whole book, and 4d. per folio in addition for all the pleadings subsequent to the declaration. (See Vol. 1, p. 220). Deliver this demurrer book to the opposite attorney, having first taken a copy thereof.

The demurrer book, where the demurrer is to the whole declaration or other pleadings, is the same precisely as the issue or paper-book on an issue in fact, as far as the entry of the pleadings, inclusive, (see Vol. 1, p. 214); the conclusion being the only part in which they differ, and which is a *curia advisari vult* instead of an award of a *venire*, and is as follows: "But because the Court of our lord the king now here are not yet advised what judgment to give of and upon the premises, a day is given to the parties aforesaid, before our said lord the king at Westminster, on the      day of      , A. D. —, to hear judgment thereupon; for that the said Court of our lord the king now here are not yet advised thereof, &c." (d). Where the demurrer is to part only of the declaration or other pleadings, the demurrer book is the same; but those parts only of the pleadings to which the demurrer relates, are to be copied into it; and if any other part be copied therein, the costs thereof will not be allowed on taxation, either as between party and party, or attorney and client. (R. H. 8 & 9 G. 4) (v).

If there be also issues in fact as well as in law, and it is intended to try the issue in fact before the demurrer shall be determined, then make up the issue or paper-book as usual, copying all the pleadings, demurrer and joinder, and make an entry of the *curia advisari vult* above mentioned, and immediately after such entry, enter an award of a *venire* as well to try the issues in fact as to assess contingent damages upon the issue in law, if it be found for the plaintiff (f). And in such case, all the proceedings, not only as to the issue in fact, but as to the issue in law also, must be entered on the aforesaid *Nisi Prius* record, when you are preparing for trial of the issue in fact, in the same order they appear in the issue or paper-book (g). If the demurrer has been determined before the trial of the issue in fact,

(d) See the form of demurrer book, Chit. Forms, 359.

(e) 7 B. & Cres. 642, 1 M. & R. 662.

(f) See form of this award of the *venire*, Chit. Forms, 120.

(g) Imp. B. R. 402.

the judgment should be stated on the issue (*h*) and *Nisi Prius* record (*i*). When there are thus several issues in law and in fact, it is optional with the plaintiff which he will have determined first (*k*); and he may make up his issue or demurrer book accordingly. It is in general preferable, for many reasons, to have the demurrer argued first; and where three actions were brought against three several defendants, for different parts they had taken in the same transaction, in one of which issue was joined on a demurrer, and issues in fact on the other two, the Court, upon application of the defendant, ordered the demurrer to be argued first, as the point of law involved in it was the foundation of the plaintiff's right to damages in the other two actions (*l*). Where there are several issues in law and in fact, and the issues in fact are tried first, if the plaintiff be nonsuit, contingent damages cannot be assessed for him on the demurrer (*m*). If the judgment on the demurrer be in favour of the plaintiff, and the pleading on which it was given cover his whole cause of action, he may execute an inquiry, or where the cause of action admits of it get the damages assessed by the Court, and afterwards enter a *nolle prosequi* as to the issue in fact. (*post*, 481.) When it is certain that the issue in fact will be determined in favour of the plaintiff, and that the demurrer must also be determined for him, or that the latter may be safely abandoned, then it may be advisable first to try the issue in fact (*n*).

When the clerk of the papers makes up the demurrer book, he gives a rule in the margin to return it, as mentioned *Vol. 1*, 218(*o*); and if the defendant do not return it within the time limited by the rule, the plaintiff may sign judgment. It seems the clerk of the papers has no discretion to give a rule to return the demurrer book in less than four days. (*Vol. 1*, 218).

When the plaintiff, in an issue in fact, adds the *similiter* to the replication, and makes up and delivers the paper book, the defendant, we have seen (*Vol. 1*, 221), may strike out the *similiter* and demur; and having indorsed on the paper book a notice of his having filed a demurrer in the office of the clerk of the papers (*p*), he must return it to the plaintiff's attorney within the time limited for that purpose. The plaintiff must then get the demurrer book made up by the clerk of the papers, and deliver it to the defendant's attorney, who must return it within twenty-four hours. (*Vol. 1*, 219). Formerly, where the defendant had pleaded a special plea or special demurrer, when the paper book was delivered to him, he might have struck out the special plea or demurrer, and returned it with the general issue or a general demurrer; in which case the plaintiff's attorney must have made up the issue or demurrer book again, and delivered it to the attorney of the defendant; (*Vol. 1*, 221); to prevent this, he had to rule

(*h*) See the form, Chit. Forms, 121.

(*i*) See the form in Exchequer, Chit. Forms, 152.

(*k*) *Duberley v. Page*, 2 T. R. 394; 2 Saund. 300, n. (3).

(*l*) *Burdett v. Colman*, 13 East, 27.

(*m*) *Snow v. Como*, 1 Str. 507.

(*n*) Chit. Sum. Pract. 144.

(*o*) See Chit. Forms, 125.

(*p*) See the form, Chit. Forms, 12; 1 Sellon, 397.

the defendant to abide by his first plea or demurrer: but this practice no longer obtains, it having been ordered by the rule of *H. T. 2 W. 4, reg. 46*, that the defendant shall not waive his plea or demurrer without leave of the Court or a Judge.

As soon as the defendant has returned the demurrer book, get a roll, as directed *Vol. 1, 22P*, and make an incipitur of the issue on it (q): make out your docket paper (r); and take it, the roll, and the demurrer book, to the clerk of the judgments, who will mark the roll and enter the docket. (See *Vol. 1, 223*). But if the plaintiff will not enter the demurrer thus on record, you may get a rule from the Master on the back of the demurrer book, or (if that have been returned) on a separate piece of paper, to compel him (s); enter it with the clerk of the rules; pay 6d.; and serve a copy of it on the plaintiff's attorney or agent. If the plaintiff do not enter the issue within the time limited by this rule, the defendant may sign judgment of nonpros. (*Vol. 1, 221*). Or, where the plaintiff has demurred, and the defendant joined in demurrer, if the defendant wish the demurrer to be argued, he may rule the plaintiff to enter the issue, as above directed; and if the plaintiff do not enter it within the time limited by the rule, the defendant's attorney may enter it and proceed to argument. (*R. E. 11 W. 3*).

*Argument.*] When the issue has been entered on the roll, either party may move for a concilium (t). This is a motion of course, and requires only counsel's signature. Get the motion paper signed by counsel, and take it, together with the roll, to the clerk of the papers, who will mark the record "Read," and sign his initials on the motion paper; pay him 1s. 6d. Then take the motion paper to the clerk of the rules, and draw up the rules for the concilium; pay 4s. (u). This is a four-day rule. And, lastly, take the rule to the clerk of the papers, who will thereupon enter the cause for argument; pay him 1s. Serve a copy of the rule on the opposite attorney (x).

Copies of the demurrer book, on brief paper, must next be delivered to the Judges: by the plaintiff's attorney, to the Chief Justice and senior Judge; and, by the defendant's attorney to the other two Judges: as directed *Vol. 1, 304*. There is no occasion to deliver a copy to the other Judge sitting in the bail court (y). If a cause be entered for argument on a Tuesday, the copies of the demurrer book must be delivered to the Judges on the Saturday preceding, and if entered for argument on a Friday then on the Tuesday preceding (z). If either party neglect to deliver the books, and the other deliver all, the latter, it seems, may move for judgment upon the demurrer without argument, for the former cannot be heard (a). The party demurring must enter the exceptions intended to be insisted on in argument in

(q) See Chit. Forms, 361.

(r) See the form, Chit. Forms, 129.

(s) See Chit. Forms, 126.

(t) See *Sharpe v. Sharpe*, Barnes, 163.

(u) See the form, Chit. Forms, 362.

(v) See *Forbes v. Lord Middleton*, 2 Str. 1242, Tidd, 737; and see *R. M. 30*

G. 2, r. 2.

(y) 1 Dowl. P. C. 80.

(z) *R. T. 40 G. 3*; 1 East, 131; Tidd, 738.

(a) 1 Sellon, 336; *Rex v. Forman*, 11 Price, 161; and see *R. M. 17 C. 1*. See *Fulham v. Bageshaw*, 1 B. & P. 292, *contra*.

the margin of the demurrer books he delivers to the Judges (*R. M. 38 G. 3*), and should leave copies of such exceptions with the other two judges (*b*). And if each party intends to take objections to the other's pleadings, each should state his objections in the margin of his paper books, &c., as above directed (*c*). The Court of Common Pleas lately intimated, that if the party demurring omitted thus to state his objections in the margin, they would give judgment against him (*d*). *A copy of the demurrer book should also be made out for counsel, to which you may add such observations as you think necessary. Mark on the back of it whether the demurrer will be argued, and when.*

Afterwards, upon some Tuesday or Friday in the term (see *Vol. 1, 59*), the demurrer will be called on for argument, in the order in which it stands in the paper: a special application for an adjournment must be made two days before the time appointed for argument. All causes remaining undetermined at the end of the term will come on in the next term in the order they stand. In general, no argument will be heard on the first four, or last four days of the term (*e*), unless the demurrer is a sham one. (*M. T. 30 G. 2*) (*f*). If there be no argument, the counsel moves for judgment, as of course. But if argued, the counsel for the party demurring is first heard in support of the demurrer; next, the counsel for the other party is heard in answer; and, lastly, the former counsel is heard in reply. One counsel only on each side (usually the junior, where there is more than one), is allowed to argue the demurrer. The Court then deliver their opinion<sup>g</sup>, according to which, the judgment is afterwards entered for the plaintiff or the defendant. *Pay the crier of the court 4s.*

Those demurrers which are not intended to be argued, are set down in a paper called the "common paper," and are called on and disposed of before a single Judge in the early part of the day; those which are to be argued, are set down in the "special paper," and argued before the full Court. Formerly, when there was no argument on demurrer, and the cause had been struck out of the paper, when called on no one appearing to pray judgment for the plaintiff, it must have been entered *de novo* (*g*); but now, when counsel has had his brief in due time, and is accidentally or inadvertently absent at the time the paper is called over, the Court will, on his moving for that purpose, allow him to take judgment as if he had been present (*h*).

*Amendment, &c.]* As to the cases in which the parties will be allowed to amend after a demurrer, see *Book 4, Part 1, Chap. 28*. Frequently, when the Judges, on perusal of paper-books, or hearing counsel, think that the objection is well founded, they will express that opinion, and suggest to the opposite counsel the expediency of amending, and which, if acceded to, will be permitted on payment

(b) *Per Lawrence, J. Appleton v. Binks*,  
1 Smith, 361, 5 East, 148, S. C.

(c) See *Clarke v. Davies*, 7 Taunt.  
72, 2 Marsh. 386, S. C.

(d) *Grottick v. Phillips*, 3 M. & Scott,

9 Bing. 723, S. C.

(e) *Lofft*, 370.

(f) *Imp. K. B. 111.*

(g) *Anon.* 2 Chit. Rep. 402.

(h) *Id. n. (a).*

of costs. But, if counsel persist in arguing in support of the pleading, and the Court have delivered their opinion, they will seldom afterwards permit an amendment (i). Under particular circumstances, however, the Court have allowed a party to withdraw his demurrer, and to plead *de novo*, even after argument (k). But if there be issues in law and in fact, and the latter be tried first, and contingent damages assessed as to the demurrer, the Court, it seems, will not, in that case, allow either of an amendment, or the demurrer being withdrawn (l).

*Judgment.*] In the evening of the day of and after the argument, obtain from the clerk of the rule a peremptory rule "that judgment be entered for the plaintiff or defendant," as the case may be; pay 6s. Judgment upon demurrer is interlocutory or final, in the same manner, and in the same cases, as judgment by default. (See *post*, 504). If interlocutory, proceed to execute your writ of inquiry, or to have principal and interest computed by the master, and sign final judgment and tax your costs, as directed, *post*, 505. We have seen, *ante*, 475, that the plaintiff may give notice of inquiry on the back of the demurrer when he demurs, or on the back of the joinder when the defendant demurs. If the judgment be final, sign it with the clerk of the judgments, as directed, *post*, 505, for which the rule above mentioned will be his authority. As to the necessity of suggesting breaches upon the roll, after judgment upon demurrer in debt on bond, and the mode of making the suggestion, and of proceeding to an inquiry thereon. (see *post*, Chap. 4, s. 3.)

In entering the judgment on the roll, if there be but a single issue, then immediately after the *curia advisari vult*, which concludes the issue, enter the appearance of the parties, and the judgment (m). If the judgment for plaintiff upon the demurrer be merely interlocutory, and a writ of inquiry executed, then follow on the roll the award of the writ of inquiry, an entry of the return of it, and the finding of the inquest; and, lastly, an entry of the final judgment, as mentioned, *post*, 481. As to the judgment for plaintiff upon demurrer to a plea in abatement, see *ante*, 473 (n). If the judgment on a single issue be for the defendant, then immediately after the entry of the *curia advisari vult*, as above, enter the appearance of the parties, and a judgment of *nil capiat per breve* (o). This is, of course, a final judgment, and gives the defendant his costs.

Where there are several issues in law and in fact, if the issues in fact were tried before the determination of the demurrer, then immediately after the award of the *venire*, as mentioned *ante*, 476, enter

(i) Tidd, 710; Chit. Sum. Prac. 148.

(k) *Howell v. MacIvers*, 4 T. R. 690; *Giddings v. Giddings*, Say. 316; *Hunt v. Puckmore*, Barnes, 155; *Collins v. Collins*, 2 Bur. 820, 2 Ld. Ken. 530, S. C.; *Anon.* 2 Wils. 173; *Potten v. Bradley*, 2 M. & P. 78.

(l) *Robinson v. Raley*, 1 Bur. 322.

(m) See forms of the entry, Chit. Forms, 363 to 365. See *Attwood v.*

*Burr*, 1 Salk. 402, 2 Ld. Raym. 821, S. C.

(n) See the forms, Chit. Forms, 364.

(o) See the form on demurrer to a declaration or replication, Chit. Forms, 364; the like, on demurrer to a plea or rejoinder, Id. 365; the like, on demurrer to a plea in abatement, Id.; the like, on demurrer to a replication to a plea in abatement, Id.

the *processu continuato* and *postea*, as directed Vol. 1, 323; then enter a continuance of the issue in law by a *curia advisari vult*, then the appearance of the parties, and judgment upon the demurrer; and lastly the final judgment. If continuances become necessary, owing to the different times at which the issues are tried, respectively, continue them alternately, the issue in law by a *curia advisari vult*, and the issue in fact by *vicecomes non misit breve* (p).

But when, of several issues in law and in fact, the issues in law have been tried first, and found for the plaintiff, then immediately after the award of the *venire*, as mentioned ante, 476, you enter continuances alternately, of the issue in law by *curia advisari vult*, and of the issue in fact by *vicecomes non misit breve*, down to the day on which the demurrer is determined; then enter the judgment on the demurrer; then an award of a *venire*, as well to try the issues in fact, as to inquire of the damages upon the issue in law; then the *processu continuato* and *postea*, as in Vol. 1, 323; and lastly, the final judgment (q). But if the plaintiff be content to take damages upon the judgment on demurrer only, he may execute a writ of inquiry as to that judgment, or, in the case of a bill of exchange or the like, may have it referred to the master, and he may enter a *nolle prosequi* as to the issues in fact (r).

If a defendant plead several pleas to the same or several counts of a declaration, and the plaintiff demur to some of the pleas, and take issue upon others; if the defendant succeed upon any of the pleas demurred to, and that plea be an answer to the whole action, the plaintiff shall not have judgment upon the issues in fact should they be found for him (s); but the only judgment that shall be entered is, *nil capiat per breve*.

*Costs.*] If either plaintiff or defendant have judgment upon demurrer, he shall be entitled to costs, and may have execution for the same by *ca. sa.*, *feri facias*, or *elegit*. 8 & 9 W. 3, c. 11, s. 2. This statute, however, did not extend to demurrers in abatement, nor to actions where the plaintiff would not be entitled to damages if he had a verdict (t). And where a defendant pleaded at the assizes a plea *puis darrein continuance*, to which the plaintiff replied, and the defendant demurred to the replication, and had judgment on the demurrer: it was holden that he was entitled to costs since the plea *puis darrein continuance* only (u). But now, by the 3 & 4 W. 4, c. 42, s. 34, the party having judgment on demurrer in any action, will be entitled to have judgment of his costs also. See further as to costs, post, Book 4, Part 1, Chap. 30.

*Execution.*] The execution is the same as in other cases. See Vol. 1, 373 to 414.

(p) See the forms of this entry, Chit. Forms, 370, 373.

(q) See the form of this entry, 2 Saund. 299-301; Chit Forms, 366, 369.

(r) 1 Saund. 109, n. (1); and see *Fleming v. Langton*, 1 Str. 533; *Anon.* 1 Salk. 219; ante, 477; post, 521. See

the forms, Chit. Forms, 374, 375. See the form of the jury process, where there are issues in fact and in law, Chit. Forms, 155.

(s) 1 Saund. 80, n. (1).

(t) Hullock, 145.

(u) *Lyttleton v. Cross*, 6 D. & R. 81.

## BOOK II

## PART III.

## PROCEEDINGS UPON NUL TIEL RECORD.

## CHAPTER I.

## WHEN A RECORD OF THE SAME COURT IS PLEADED.

*Issue, &c.*] WHEN the plaintiff replies *nul tiel record*, or replies to a plea of *nul tiel record*, he concludes his replication that the record may be inspected; and a day is accordingly given to the parties for that purpose (*a*). As this completes the pleadings, you may get the clerk of the papers to make up the paper-book, which must be delivered and returned as in ordinary cases (*b*). The paper book is made up by the clerk of the papers in all cases, excepting where *nul tiel record* is pleaded to a declaration in debt on a judgment or recognizance; in which case the plea is to be delivered to, and the issue made up by, the attorney (*Vol. 1, 220*). The paper book is the same in form as in an issue triable by the country, (*see Vol. 1, 214, 216*), excepting the conclusion (*c*).

The plaintiff, however, when the defendant pleads a record of the same Court, instead of replying *nul tiel record*, may demand of the defendant a note in writing of the term and number-roll whereon such judgment or matter of record is entered or filed, or, in default thereof, the plea is not to be received, and the plaintiff may sign judgment. (*R. T. 5 & 6 G. 2.*) (*d*). But this cannot be done, when the defendant

(a) See the form, Chit. Forms, 378.

(b) *Ante*, Vol. 1, 220. It has been held in the Common Pleas, that, as the issue is complete by the prayer of the inspection of the record, though the defendant demur to the replication, the plaintiff may, nevertheless, sign

judgment on the production of the record on the given day. *Tipping v. Johnson*, 2 B. & P. 302; *Jackson v. Wickes*, 2 Marsh. 354, 7 Taunt. 30, S. C.

(c) See the form, Chit. Forms, 382.

(d) *Kellw. 95, 96; Theobald v. Long*, 1 Ld. Raym. 347, Holt, 557, S. C.;

pleads a record of *another* Court; which is the reason that, in pleading the sham plea of judgment recovered, it is always a judgment of another Court that is pleaded.

Where the plaintiff replies *nul tiel record*, he may obtain from the master, on the back of the paper book, a rule to produce the record (d); enter it with the clerk of the rules; pay 6d.; and serve a copy of it on the defendant's attorney. Or when the plaintiff replies to a plea of *nul tiel record*, he must give notice in writing to the defendant's attorney that he will produce the record on a day therein mentioned (e).

Get a roll, and enter all the proceedings upon it; docket your entry, and carry in the roll, as directed Vol. 1, 222, 223 (f).

*Trial, &c.*] Let the party who has to produce the record bespeak it at the Treasury, and desire that it may be brought into Court; pay 4s. 6d. Then upon the day appointed by the notice or rule above mentioned, let the plaintiff give the paper book to one of the criers in Court, who will thereupon make proclamation to produce the record; pay 4s. 6d.; and the party who has to produce the record must get one of the criers to bring the roll into Court (g). If the record be not produced, or if produced and found not to maintain the plea, judgment of failure of record is given for the opposite party; otherwise judgment that the party hath perfected the record will be given for the party who pleaded it.

Judgment is interlocutory or final, in the same manner, and in the same cases as judgment upon demurrer or default. (*See ante*, 480; *post*, 504). If interlocutory, make an incipitur on plain paper, and take it to the clerk of the judgments, as directed *post*, 502, and he will sign judgment. Then proceed to sue out and execute your writ of inquiry, or have principal and interest computed by the master, and sign final judgment, as directed *post*, 513, &c. (h). In this Court it is not necessary to have a rule before interlocutory judgment can be signed. If your judgment be final, write out a memorandum of a rule for judgment on a slip of paper (i), and take and enter it with the clerk of the rules; pay him 6d. The rule expires in four days, exclusive of the day on which it is entered, and inclusive of the last day, unless the last day be a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving; in which case that day would not be reckoned as one of the four. (*R. H. 2 W. 4, reg. VIII.*) After the expiration of these four days, make an incipitur on plain paper, and take it to the clerk of the judgments, who will sign the judgment; give the opposite party the usual one day's notice of your intention to tax

*Cremier v. Wicket*, Id. 550, 12 Mod. 350, S. C.; *Wilson v. Ingoldby*, 2 Id. 1179; *Hunter v. Wiseman*, 2 Str. 823, 1 Saund. 92, n. (3). See a form of demand, Chit. Forms, 382.

(d) See the form, Chit. Forms, 382.

(e) *Tidd*, 743. See the form, Chit. Forms, 383.

(f) See as to the form of the entry

Chit. Forms, 126; and of the docket paper, Id. 129.

(g) See as to the form of the issue or paper-book, Chit. Forms, 382.

(h) See *Moses v. Compton*, 6 M. & Sel. 381.

(i) See the form of the memorandum, Chit. Forms, 383.



the costs, (see Vol. 1, 319), and on the day named for such taxation, take the judgment paper to the master, who will tax the costs, and mark them on it. You may then sue out execution (j). Judgment upon a replication of *nul tiel* record, to a plea in abatement, is, we have seen, not final, but merely a *respondeas ouster*. (*Ante*, 473).

Judgment for the defendant is, of course, final, and signed as above directed, a rule for judgment having been previously given.

In entering the proceedings upon the roll; if the issue be single, then immediately after the conclusion of the issue, enter, in a new paragraph, the appearance of the parties and the judgment; and if the judgment be interlocutory, and the writ of inquiry have been executed, enter the award of the writ of inquiry, the return to it, and the finding of the inquest, and lastly the final judgment. But where there are several issues, some to be tried by the record, others by the country, the entries may be made in the manner directed, *ante*, 480, as to proceedings upon a demurrer, *mutatis mutandis* (k).

The execution is the same as in ordinary cases.

(j) See the forms of judgment for plaintiff on *nul tiel* record, Chit. Forms, 386; of a judgment for defendant on *nul tiel* record, *Id.* 387.

(k) See as to the forms, Chit. Forms,

366 to 374. See as to the form of the jury process, where there are several issues, some to be tried by the country, and others by the record, *Id.* 120.

## CHAPTER II.

## WHEN A RECORD OF ANOTHER COURT IS PLEADED.

*Issue.*] LET the issue or paper book be made up and delivered, as directed in the preceding chapter (a). You cannot in this case demand a note in writing of the term and number of the roll, &c. as mentioned in the preceding chapter; but you must plead *nul tiel record*, and so proceed to trial.

*Certiorari.*] The only way of bringing in the record is by writ of *certiorari* (b). This writ must be sued out by the party who has to produce the record, directed to the Chief Justice, Judge, or officer of the Court below, in whose custody the record is supposed to be (c). It may be sued out either in this Court, or with the cursitor; if the latter, it is an original writ, tested in or out of term, returnable on a general return day, and made out by the cursitor, upon your furnishing him with a *præcipe*; if sued out in this Court, it is a judicial writ, tested in the name of the Chief Justice on some day in term, and returnable on a day certain, and signed and sealed as in ordinary cases. It is sufficient to return the tenor of the record, upon this writ, without certifying the record itself (d).

*Trial, &c.*] Give notice of your bringing in the record, or rule the other party to bring it in, and proceed to trial, judgment, &c. as directed in the preceding chapter.

(a) See *Newberry v. Strudwick*, Barnes, 383, 384.  
335. See the forms, Chit. Forms, 382.

(b) *Hewson v. Brown*, 2 Bur. 1034.

(c) See the form of it, Chit. Forms,

383, 384.

(d) *Hambleton v. Lancashire*, 3 Salk. 296; Gilb. Execution, 143

## BOOK II.

## PART IV.

## PROCEEDINGS UPON JUDGMENT BY CONFESSION OR DEFAULT.

## CHAPTER I.

## JUDGMENT BY CONFESSION.

*Cognovit* (a).] WHERE the defendant has no available defence to make to the action, it is usual for him, instead of proceeding to trial, or of allowing judgment to pass against him by default, to give the plaintiff a *cognovit* or written confession of the action, usually upon condition that he shall be allowed a certain time for the payment of the debt or damages, the amount of such debt or damages being, in general, first ascertained and agreed upon. It seems a *cognovit* may be given before the plaintiff has declared (b); but this is not usual: moreover, if the defendant be a trader, and subject to the bankrupt laws, an execution under the *cognovit* would come within the mean-

(a) In the event of death, it is frequently a more advantageous security than a warrant of attorney, for notwithstanding both be revoked by the death of the party, yet when it becomes necessary to obtain the leave of the Court to enter up judgment on a warrant of attorney, it must be shewn that the party is living; because, if the Court know him to be dead, they will not allow judgment to be signed; but when there is already a confession of the debt on record, the plaintiff does not want the authority of the Court to enter up judgment, which follows as of course upon a *cognovit*. (See *per Gaselce, J., Calvert v. Tomlin*, 5 Bing. 1, 5, 2 M. & P. 1, S. C. *post*, 495). If the defendant be subject to the bankrupt laws, a *cognovit* after declaration

may be a safer security than a warrant of attorney. (See 1 W. 4, sess. 1, c. 7, s. 7; 6 G. 4, c. 16, s. 108; *ante*, Vol. 1, 395).

(b) *Webb v. Aspinall*, 7 Taunt. 701, 1 Moore, 428, S. C.; and see *Davis v. Hughes*, 7 T. R. 207, n. (a); *Hurst v. Jennings*, 5 B. & Cres. 658; *Wade v. Swift*, 8 Price, 513, Tidd, 9 ed. 559. An opinion has been promulgated in the profession, that it cannot be given before the plaintiff has declared, but there is no regularly reported decision to warrant such opinion, the correctness of which seems questionable. If, however, so given, the *cognovit* for safety had better contain a clause, not to take any advantage of its being given before declaration.

ing of the 108th section of the bankrupt act, (6 G. 4, c. 16), and probably be unavailable, unless the *cognovit* were given after declaration, as required by the 1 W. 4, sess. 1, c. 7, s. 7. (*ante*, Vol. 1, 395). It should seem that one partner cannot bind his copartner by a *cognovit*, without his consent: at all events, after a partnership is dissolved, one of the partners has no power to bind the other by giving a *cognovit* to pay costs as between attorney and client (c). Where one of several parties to a *cognovit* signs after the others, his signing relates back to the time of their signing (d).

No prescribed form of *cognovit* is, in general, requisite (e). It ought, however, always expressly to show the terms upon which it is given. If any agreement or understanding be entered into, contrary to the express terms of it, the Court will not, in general, regard such agreement, but put the party to his remedy, if any, by action (g). Sometimes, however, the Court will set aside a judgment entered up, and execution issued out contrary to the express agreement or understanding of the parties at the time of confessing the judgment (f). Where the plaintiff, on the eve of trial, accepted from the defendant a *cognovit* for a certain sum payable at a future day, in full discharge of the action, and the master, on costs, allowed the plaintiff costs previous to the *cognovit*, the Court refused to admit the plaintiff's affidavit, stating a verbal agreement, that he should have such costs in case the defendant made default in payment, and that he had made such default, and made the rule for the disallowance of such costs absolute (h). By the 3 G. 4, c. 39, s. 4, a *cognovit* which is to be filed according to that act, (*post*, 488), to make it available against creditors in the event of the bankruptcy of the defendant, if the same be given subject to a condition, such condition must be written on the same paper, or parchment, on which the *cognovit* is, before filing it, otherwise it will be void as against the assignees (i). This provision is extended in favour of the creditors of an insolvent debtor, by the 7 G. 4, c. 57, s. 33 (j).

The *cognovit* generally contains an agreement upon the part of the defendant that no writ of error shall be brought, nor bill in equity filed (k). It frequently also contains an agreement to waive the

(c) *Rathbone v. Drakeford*, 4 M. & P. 37, 6 Bing. 375. See *Brutton v. Burton*, 1 Chit. Rep. 707; *Sowden v. Salt*, 10 Moore, 383, 3 Bing. 101, S. C.

(d) *Perry v. Turner*, 1 Dowl. P. C. 300, 2 C. & J. 89, 2 Tyr. 128, S. C.

(e) See *Hurst v. Jennings*, 5 B. & Cres. 650, 8 D. & R. 424, S. C. See the forms in debt, Chit. Forms, 390; in *assumpsit*, Id. 389; in *ejectment*, Id.

(f) See *Anon.* 1 Salk. 400.

(g) *Dillon v. Browne*, 6 Mod. 14; *Hatton v. Young*, 2 W. Bla. 943.

(h) *Anon.* 7 D. & R. 375.

(i) See *Bennett v. Daniel*, 10 B. & Cres. 500; *Green v. Gray*, 1 Dowl. P. C. 350.

(j) *Morris v. Mellin*, 6 B. & Cres. 446. decided before the 7 G. 4, c. 57.

(k) But this stipulation does not, it should seem, oust the superior Courts of their jurisdiction; see *Wade v. Rogers*, 2 W. Bla. 780; *Kill v. Hollister*, 1 Wils. 129, *post*, 493; and see this stipulation commented on in the case of *Shaw v. Marquis of Worcester*, 4 M. & P. 21, 6 Bing. 387. It should seem from that case, that such stipulation would not deprive the defendant of taking advantage of the plaintiff's not executing a writ of inquiry, or of not suggesting breaches under the 8 & 9 W. 3, c. 11, when necessary; and see *Howell v. Stratton*, 2 Smith, 69.

necessity for a *scire facias* to revive the judgment, and such agreement will be binding on the defendant (*l*).

If given after plea pleaded (*m*), it contains an agreement to withdraw the plea; in which case it is termed a *cognovit actionem relicta verificatione*, from the form of the entry of it upon the roll (*n*).

The *cognovit* may be of part of the cause of action, or of the entire; if of part, the plaintiff can only sign judgment for the part confessed, and proceed in the action as to the residue (*o*).

The *cognovit* may be written upon plain paper, if it contain no terms of agreement, to the amount of 20*l*., between the parties; but if it contain such terms, as if it be conditioned for the payment of the debt (to the amount of 20*l*. or more) or debt and costs (to that amount or more) by instalments (*p*), or the like, it must be written on a 20*s*. stamp. A stipulation not to take advantage of the *cognovit* being given before declaration, does not render a stamp necessary (*q*). The want of, or a defect in, the stamp, will not render the *cognovit* unavailable, for a proper stamp may be procured on payment of the penalty, (5*l*.), and this at any time, even after motion to set aside a judgment entered up on it (*r*).

If the *cognovit* be signed by the party, whilst in custody of the sheriff or other officer upon mesne process, for the same cause of action for which the *cognovit* is given, it will not be of any force unless there be present some attorney on behalf of such party in custody, expressly named by him, and attending, at his request, to inform him of the nature and effect of such *cognovit* before the same is executed, and the attorney must subscribe his name as a witness to the due execution thereof, and declare himself to be the attorney for the party, and state that he subscribes as such attorney (*s*). The decisions on this practice, as regards warrants of attorney hereafter (*post*, 493) noticed, will, it seems, here apply.

As to when the sheriff or bail are discharged by taking a *cognovit* from the principal, *see ante*, Vol. 1, 132, 144, 428.

*In what cases filed, &c.*] The *cognovit* (*t*), when given in a personal action, and an affidavit of the time of the execution thereof, must be filed with the clerk of the judgments within 21 days after its execution, to render it, or any judgment or execution thereupon, valid as against the assignees (*u*) of the defendant, if he should be-

(*l*) *Howell v. Stratton*, 2 Smith, 65; *Morris v. Jones*, 2 B. & Cres. 242, 3 D. & R. 603, S. C.; *Lee's Dict.* 2 ed. 1228.

(*m*) *Quære* if it be necessary to have such agreement unless the *cognovit* be not given until after issue joined.

(*n*) *See* the form, *Chit Forms*, 390.

(*o*) 1 Sellon, 373; *Tidd*, 660.

(*p*) *Ames v. Hill*, 2 B. & P. 150; *Reardon v. Swaby*, 4 East, 188; *Jay v. Warren*, 1 C. & P. 532.

(*q*) *Green v. Gray*, 1 Dowl. P. C. 350.

(*r*) *See Burton v. Kirkby*, 7 Taunt. 174, 2 Marsh. 480, S. C.

(*s*) R. H. 2 W. 4, r. 72. *See Parkinson v. Caines*, 3 T. R. 616; *Bayley v. Taylor*, 8 D. & R. 56, the latter case being no longer law.

(*t*) If the action be in any other Court than the Court of King's Bench, then a copy of the *cognovit*, and not the *cognovit* itself, must be filed, as above directed.

(*u*) It is not absolutely void, but only inoperative against the assignees. *Green v. Gray*, 1 Dowl. P. C. 350; *Bennet v. Daniel*, 10 B. & Cres. 500; *Morris v. Mellin*, 6 B. & Cres. 446.

come bankrupt under a fiat issued after the 21 days. (3 G. 4, c. 39, s. 3). Pay 1s. (*Id.* s. 6). As to the necessity for stating the condition on the *cognovit*, see *ante*, 487. The ~~same~~ act, section 7, provides, that any person shall be entitled to have an office copy of the *cognovit*, upon paying for the same at the like rate as for an office copy of a judgment. The fifth section of the act enacts, that the clerk of the judgments shall keep a book, containing particulars of each *cognovit* filed, &c. Where a warrant of attorney was not filed, as directed by the 3 G. 4, c. 39, s. 2, *post*, 497, and execution issued after an act of bankruptcy, but more than two months before the commission issued, it was held not a case within the 6 G. 4, c. 16, s. 81, (*Vol.* 1, 394, 395); but whether it would have been within that act, if execution had been executed before any act of bankruptcy, has not been decided (x). A bond upon the face of it appeared to be conditioned for the payment of a sum certain; but by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed that it should be lawful for the obligees to commence an action upon the bond, and proceed to judgment whenever they should think fit, and upon judgment being obtained to issue execution, and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them; a judgment having been entered up by virtue of this deed, the obligees issued execution, without assigning breaches or executing a writ of inquiry; and the Court held, that the indenture, by virtue of which the judgment was entered up, was in legal effect a *cognovit actionem*, within the meaning of the third section of the statute 3 G. 4, c. 39; or if not, that it was a contrivance to defeat the provisions of that statute; and this indenture not having been filed with the proper officer, within 21 days after its execution, nor judgment entered up within that period, as required by the statute, the Court upon application by the assignees of the obligor, who had become bankrupt, ordered the execution to be withdrawn (y). If the *cognovit* have been filed, as above mentioned, and the debt be afterwards satisfied or discharged, a judge, upon being satisfied of that fact, may order a memorandum of satisfaction to be written upon the *cognovit*. (3 G. 4, c. 39, s. 8).

The insolvent debtors' act (7 G. 4, c. 57, s. 33) extends these provisions in favour of the creditors of an insolvent debtor.

*Judgment, when and how signed. Execution, &c.]* If the *cognovit* be made unconditionally, the plaintiff may, of course, sign judgment and sue out execution as soon as he pleases; but if made upon terms, judgment cannot be signed or execution sued out contrary to such terms, otherwise the Court, upon application, will set it aside (z). Judgment may be entered up after the death of the plain-

(x) *Wilson v. Whittaker*, 1 M. & M. 8.

(y) *Hurst v. Jennings*, 5 B. & Cress.

(z) *Ante*, 487; *Hatton v. Young*, 2 W.

650, 8 D. & R. 424, S. C.

Bl. 943.

tiff or defendant pending the vacation as of the preceding term (a); and where a *cognovit* was given on the 8th February in Hilary term, with a condition that judgment should not be entered unless default should be made in payment on the ensuing 1st April, and the defendant died in Hilary vacation before the 1st April, judgment entered up on the 10th April in Hilary vacation after defendant's death, was held regular, as relating to the first day of Hilary term, as also execution tested of a day anterior in that term to the defendant's death (b).

Where the *cognovit* is given before plea pleaded, and the defendant has not appeared by putting in bail, or by entering a common appearance, you must enter a common appearance (see Vol. 1, 454) for him in pursuance of the statute, before you can sign judgment (c). Then make an incipitur of the declaration on plain paper; make an incipitur also on the roll, as directed, Vol. 1, 221, 222. (See R. M. 5 A. r. 1). Take the judgment paper, roll, and *cognovit* (d), to the clerk of the judgments, and he will, upon production of the *cognovit*, sign the judgment; then (if the *cognovit* does not agree on a specific sum for costs, but requires them to be taxed) take them to the master, who will tax the costs, and mark them on the judgment paper; and, after taxation of the costs, the *cognovit* must be filed with the clerk of the judgments (e). You must also (if the *cognovit* does not agree on a specific sum for costs), give the usual one day's notice of the intended taxation of the costs, as directed ante, Vol. 1, 319. After which, if the judgment be final, you may proceed to sue out execution, according to the terms of the *cognovit*, producing the judgment paper to the sealer of the writs at the time he seals the *fi. fa.* or *ca. sa.* (R. H. 2 W. 4, r. 75; R. H. 2 & 3 G. 4). Or if the judgment be interlocutory only, you may proceed to execute a writ of inquiry (f). Where judgment had been irregularly signed, without entering an appearance for the defendant, the Court held that the defendant was estopped by his *cognovit* from objecting to the irregularity (g).

If the *cognovit* have been given after plea pleaded, enter the pleadings, as far as they have gone, upon the roll, as directed, Vol. 1, 222, Let the defendant, (R. H. 2 W. 4. r. 100), or his attorney, if he have any, attend with you before the master, for the purpose of withdrawing the plea (h); and the master will accordingly enter the *relicta verifications* in the margin of the roll, and will tax your costs at the same time. Then take the roll, judgment paper, and *cognovit*, to the clerk of the judgments, as above directed, and he will sign judgment (i).

We have already pointed out how far the plaintiff is at liberty to

(a) *Calvert v. Tomlin*, 5 Bing. 1, 2 M. & P. 1, S. C.; *Cowie v. Allaway*, 8 T. R. 257.

(b) *Id.* ante, Vol. 1, 322.

(c) See as to the form, Chit. Forms, 342.

(d) See 25 G. 3, c. 80, s. 20.

(e) See R. H. 2 & 3 G. 4, K. B.; 5 B. & Ald. 560; 1 D. & R. 471; 2 Chit. Rep. 377.

(f) See the forms of the entry of the

judgment, &c. in debt, Chit. Forms, 393; the like in *assumpsit*, *Id.* 392; the like, with a *relicta verifications*, *Id.* 393, 394; the like in ejectment, *Id.*; of the docket paper, *Id.* 395.

(g) *Davis v. Hughes*, 7 T. R. 206. The plaintiff had entered an appearance after he signed the judgment.

(h) *Anon.* 1 Ld. Raym. 345.

(i) See the form of the entry of the judgment, &c. Chit. Forms, 393, 394.

avail himself of an execution, under a *cognovit*, in the event of the defendant's becoming bankrupt, or discharged under the insolvent act. (*See Vol. 1, 395, 396*).

If the execution be against good faith, and contrary to the terms of the *cognovit*, or the express understanding of the parties, the Court, we have seen, *ante*, 487, will sometimes set it aside. Where the defendant, in an action on the case, gave a *cognovit* for 200*l.*, with a defeazance conditioned for the performance of various matters by a given time, and performed the matters in part, at least, in two months after the time stipulated, the plaintiff having issued execution on the *cognovit*, the Court of Common Pleas referred it to the prothonotary, to see how much, if any thing, ought to be paid to the plaintiff (*h*). If the plaintiff be guilty of any excess in the amount for which he ought to have levied, the Court will either set the execution aside; or, in case of a mistake, refer it to the master, or, if necessary, to a jury, to ascertain for what sum the execution ought to stand (*k*), and an action might, perhaps, be supported against him by the defendant (*l*).

A *scire facias* to revive the judgment may be rendered unnecessary by the defendant, in the *cognovit*, expressly agreeing to dispense with it. (*Ante*, 487).

*Implied confession of action.*] Besides the case of judgment by default, where the defendant's default is deemed tantamount to a confession (and which shall be fully considered in Chapter 3), there is also a confession of action in some cases implied in the defendant's pleading; as where an executor or administrator pleads *plene administravit*, or *plene administravit præter*, without pleading in bar, this is impliedly a confession of the action; and upon the plea of *plene administravit*, the plaintiff may take judgment of assets *in futuro*; or, upon *plene administravit præter*, take judgment presently of the assets acknowledged to be in the hands of the defendant, and of assets *in futuro*, for the residue. *See further upon this subject, post, Book 3, Part 2, Chap. 5, Sect. 2.*

*Writ of inquiry.*] In all these cases of implied confessions, and also of express confessions, which do not ascertain the amount of the damages, the plaintiff must enter up interlocutory judgment only, and then execute a writ of inquiry; except in most actions of debt and ejectment; in which cases, as the damages recoverable are not of consequence sufficient to warrant the expense of a writ of inquiry, the plaintiff may sign final judgment in the first instance; and except also in a few other cases hereinafter mentioned in Chapter 4. After the entry of the interlocutory judgment on the roll, follow the award of the writ of inquiry, the sheriff's return to it, and final judgment. *See post, tit. Writ of Inquiry, Chap. 4.*

(j) *Charrington v. Laing*, 3 M. & P. 587, 6 Bing. 242; S.C. and see *Doe d. Holt v. Roe*, 4 M. & P. 177, 6 Bing. 447, S.C.  
(k) See *per Tindal, C. J.* in *Shaw v.*

*Marquis of Worcester*, 3 M. & P. 587, 6 Bing. 349, S.C.

(l) *Wentworth v. Bullen*, 9 B. & Cres. 840.



## CHAPTER II.

## JUDGMENT UPON A WARRANT OF ATTORNEY.

*Warrant of Attorney (a).]* A WARRANT of attorney is a written authority to the attorney or attorneys to whom it is directed, to appear for the party executing it, and receive a declaration for him in an action at the suit of a person therein mentioned, and thereupon to confess the same, or to suffer judgment to pass by default; it also authorizes the attorney to execute a release of errors. It may be given whether an action be depending or not (b).

It must be on a proper stamp. The defeazance does not require a separate stamp from that upon the warrant (c). But, although the warrant be not stamped at all, or be improperly stamped, and therefore unavailable, yet it may be made available on payment of the usual penalty (5*l.*) and the proper stamp affixed; and this may be done even after a rule *nisi* obtained to set aside a judgment on the warrant of attorney for the want of or a defect in the stamp (d).

It should seem that one partner cannot give a warrant of attorney to bind his copartner without his consent; at all events, he could not do it after the partnership is dissolved (e). But a warrant of attorney under seal, executed by one person for himself and his partner, in the absence of the latter, but with his consent, is a sufficient authority for signing judgment against both (f).

By rule M. 42 G. 3, every attorney of this Court who shall prepare any warrant of attorney to confess a judgment, which is to be subject to any defeazance, shall cause such defeazance to be written on the same paper or parchment on which the warrant of attorney shall be written; or cause a memorandum in writing to be made on such warrant of attorney, containing the substance and effect of such defeazance (g). If the attorney, however, omit to write the defeazance upon the warrant of attorney, as directed by this rule, the omission does not avoid the instrument, but merely renders the attorney answerable on motion, for the neglect of a duty thus imposed on him by the Court (h). Where, however, the warrant of attorney

(a) When not so preferable a security as a *cognovit*, see *ante*, 486, n. a.

(b) See *Baddely v. Shafte*, 8 Taunt. 434; *Reeves v. Slater*, 7 B. & Cres. 486, 1 M. & Ry. 265, S. C. See the form, Chit. Forms, 396.

(c) *Caulthorne v. Holben*, 1 N. R. 279.

(d) *Burton v. Kirkby*, 7 Taunt. 174,

2 Marsh. 480, S. C.

(e) See *ante*, 487, as to *cognovits*.

(f) *Brutton v. Burton*, 1 Chit. Rep. 707.

(g) See *Barber v. Barber*, 3 Taunt. 465; *Morell v. Dubost*, Id. 235. See the form, Chit. Forms, 397.

(h) *Shaw v. Evans*, 14 East, 576;

or a copy of it, is filed, as mentioned *post*, 497, if it have been given subject to a defeazance, the defeazance must be written on the same paper or parchment on which the warrant of attorney is written, before the same or the copy thereof is filed, otherwise the warrant will be void (3 G. 4, c. 39, s. 4; 7 G. 4, c. 57, s. 33) as against the assignees of the defendant if he become a bankrupt or insolvent, though not so as between the parties themselves (i).

The defeazance on the warrant, also, sometimes contains a stipulation that no *scire facias* shall be necessary to revive a judgment, and such stipulation will be binding on the defendant (j). If the warrant be given for the purpose of securing the payment of an annuity, or of money by instalments, it is also usual to insert a clause in it, dispensing with the necessity of a *scire facias* (k). It may admit of doubt, perhaps, whether this clause can have the effect intended by it (l); besides, from several cases recently decided in the Court of Common Pleas, it seems to be unnecessary: that Court having determined that a warrant of attorney is not within the stat. 8 & 9 W. 3, c. 11, s. 8, which requires suggestions of breaches and the *scire facias*, (see *post*, Chap. 4, s. 3) (m), even although it be given as a collateral security with a bond (n).

*How executed.*] The warrant of attorney is signed, sealed, and decreed; the defeazance only signed. It is not necessary, however, that the warrant should be sealed, unless, perhaps, for the purpose of the release of errors (o). Neither the warrant nor the defeazance need be read over to the party previously to its being executed, as was formerly required by the Court of Common Pleas (p).

An attesting witness is not, in general, requisite (q). But if the warrant be executed by a person in custody of any sheriff or other officer on mesne process, it shall not be of any force, unless there be present some attorney on the behalf of such person in custody, to be expressly named by him and attending at his request (r), to inform him of the nature and effect of such warrant of attorney, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney. (R. H. 2 W. 4, r. 72; R. E. 4 G. 2; R. E. 15 C. 2). Therefore,

*Partridge v. Fraser*, 7 Taunt. 307, 1 Moore, 54, S. C.; and see *Sansom v. Goode*, 2 B. & Ald. 568, 1 Chit. Rep. 311, S. C.; *Barber v. Barber*, 3 Taunt. 465. (i) *Bennet v. Daniel*, 10 B. & Cres. 500; *Morris v. Mellin*, 6 B. & Cres. 446; *Aireton v. Davis*, 9 Bingh. 740, *ante*, 488.

(j) See *ante*, 497; and see *id.* as to the clause about bringing error, &c.

(k) See form, Chit. Forms, 398.

(l) *Kill v. Hollister*, 1 Wils. 129, *ante*, 487.

(m) *Shaw v. Marquis of Worcester*, 6 Bing. 385; *Cox v. Rodbard*, 3 Taunt.

74; *Kimmersley v. Mussen*, 5 Taunt. 264; and MS. E. 1814, S. P. diet. in B. R.; and see *Tilly v. Best*, 16 East, 163.

(n) *Austerbury v. Morgan*, 2 Taunt. 195.

(o) *Kimmersley v. Mussen*, 5 Taunt. 264; *Brutton v. Burton*, 1 Chit. Rep. 707.

(p) See *Taylor v. Parkinson*, 2 H. Bl. 383.

(q) *Kimmersley v. Mussen*, 5 Taunt. 264; *Barrow v. Mashiter*, 4 East. 430.

(r) See *Osborne v. Davis*, 4 Taunt. 977.

if no attorney be present at the execution, the Court will set aside the judgment or other proceedings upon it (*s*); although other persons not in custody have also joined in the warrant, as collateral securities (*t*); unless it have been done by the contrivance of the defendant, and purposely, with a view to cheat the plaintiff (*u*). Where it appeared that, upon the defendant's being informed that an attorney must be present on his part, he produced a person as such, in whose presence he executed the warrant of attorney; the Court refused afterwards to set aside the proceedings, on the ground of the person so produced not being an attorney (*v*). It is clear, however, that the presence of the plaintiff's attorney will not be sufficient, even although the defendant consent at the time to his acting as his attorney also (*x*). But if the defendant himself be an attorney, the attendance of any other on his part may be dispensed with, as not being within the meaning of the rule (*y*). The person thus required to attest the execution, must be an attorney; the attendance of an attorney's clerk is not sufficient (*z*); but it is not essentially necessary that he should be an attorney of this Court (*a*). The attorney must have taken out his certificate within a year (*b*).

This rule is not confined to the case of prisoners in the custody of the sheriff or other officer who arrested them, but also extends to prisoners in the custody of the marshal (*c*). It does not, however, extend to persons in custody in execution (*d*); nor to warrants of attorney given for any other cause of action than that for which the defendant is in custody (*e*); and consequently it does not extend to the case of a person in custody on criminal process (*f*). But although the rule does not extend to a defendant in custody in execution, yet, if it could be shewn that he was prevailed upon to acknowledge a judgment for more money than was really due, the Court, upon application, would relieve him (*g*). Where a defendant, whilst in custody in Ireland, gave a warrant of attorney to confess a judgment in this Court, the Court held that the necessity of an attorney being present on the part of the defendant, at the time of its execution, was as essential as if the defendant were in this country (*h*).

*How far revocable, &c*]. A warrant of attorney to confess a judgment cannot be expressly revoked; or if the defendant do that which pur-

(*s*) See *Anon.* 1 Salk. 462, note (*a*); *Ruffle v. Hitchcock*, 2 W. Bl. 1097.

(*t*) *Valentine v. Gullaud*, 2 Taunt. 49.

(*u*) *Gilman v. Hill*, Cowp. 141.

(*v*) *Jeyes v. Booth*, 1 B. & P. 97.

(*r*) *Hutson v. Hutson*, 7 T. R. 7.

(*y*) *Walton v. Stanton*, Barnes, 37.

(*z*) *Barnes v. Ward*, Barnes, 42; *Paul v. Cleaver*, 2 Taunt. 360. See *Gilman v. Hill*, Cowp. 142.

(*a*) *Blund v. Pakenham*, 1 Str. 530; *Vilmott v. Barry*, Barnes, 44.

(*b*) *Verge v. Dodd*, Tidd, Sup. 57.

(*c*) *Parkinson v. Caines*, 3 T. R. 616;

and see *Waraker v. Gascoigne*, 2 W. Bl. 1297.

(*d*) *Birch v. Sharland*, 1 T. R. 715; *Crompton v. Steward*, 7 T. R. 19; *Fell v. Riley*, Cowp. 281; *Watkins v. Hanbury*, 2 Str. 1245.

(*e*) *Holcombe v. Wade*, 3 Bur. 1792; *Finn v. Hutchinson*, 2 Ld. Raym. 797; *Smith v. Burlington*, 1 East, 241; see vide *Faulkner v. Ennott*, 8 Taunt. 233, 2 Moore, 176, S. C.

(*f*) *Charlton v. Fletcher*, 4 T. R. 433.

(*g*) *Fell v. Riley*, 1 Cowp. 281.

(*h*) *Fitzgerald v. Plunket*, 2 Str. 1247.

ports to be a revocation of it, the plaintiff may enter up judgment notwithstanding (i). There are some cases of implied revocation, however, which it may be necessary to mention.

The death of either party is in general a revocation of the warrant. This, however, may in general be remedied, if the plaintiff be entitled to enter up judgment at the time, by entering up the judgment as of the term in or after which the party died, before the first day of the following term (k). But if it become necessary to obtain the leave of the Court to enter up the judgment, they will seldom grant it after the death of the plaintiff, particularly where the application is not made until after the first day of the term following the death (l); and in no case will they allow it to be entered up after the death of a sole defendant (m). If the warrant, however, in its terms expressly authorises the judgment to be entered up by the plaintiff's representatives, the Court will allow them to enter it up; as if it be to enter up judgment "at the suit of A., his heirs, executors, or administrators" (n). But where the warrant of attorney merely empowered the plaintiff to enter up judgment, without mentioning his executors, although the defeazance stated the judgment was to secure the payment of £200 "to plaintiff, his executors, &c.," the Court refused to allow them to enter up judgment (o). If a warrant of attorney be given to two or more, and one of them die, the Court will allow the judgment to be entered up by the survivors (q). If a warrant of attorney be given by two, and one of them die, the plaintiff cannot, unless the terms of the warrant of attorney allow it, have leave to enter up the judgment afterwards; not against both, on account of the rule above mentioned; nor against the survivor, for the judgment would not, in that case, pursue the authority (r). But where a warrant of attorney was given by two persons in the Common Pleas, to enter up judgment on a joint bond against *me*, not *us*; the Court, after the death of one of them, allowed judgment to be entered up against the other (s).

If a *feme sole* give a warrant of attorney, it has been holden that her subsequent marriage, before judgment is entered up, is a revocation of the warrant (t). But, from subsequent cases, it appears, the Court will, notwithstanding the marriage, allow the judgment to be entered up against the husband and wife (u). And in *Walter v.*

(i) *Odes v. Woodward*, 2 Ld. Raym. 850, 1 Salk. 87, S. C.

(k) *Odes v. Woodward*, 1 Salk. 87, 2 Ld. Raym. 766, S. C.; *Price v. Hughes*, 1 Dowl. P. C. 448; *Chaney v. Needham*, 2 Str. 1081; *Fuller v. Jocelyn*, Id. 882; *Savile v. Wiltshire*, Barnes, 270, 1 Saund. 219 e; *Calvert v. Tomlin*, 5 Bing. 1, 2 M. & P. 1, S. C.; ante, 489, 490.

(l) *Cowie v. Allaway*, 8 T. R. 257; *Wild v. Sands*, 2 Str. 711.

(m) *Chaney v. Needham*, 2 Str. 1081; *Calvert v. Tomlin*, 5 Bing. 1, 2 M. & P. 1, S. C.; vide post, 498.

(n) *Coles v. Haden*, Barnes, 44.

(o) *Henshall v. Matthew*, 7 Bing. 337,

5 M. & P. 157, 1 Dowl. P. C. 217, S. C.; *Manville v. Manville*, 1 Dowl. P. C. 544.

(q) *Fendall v. May*, 2 M. & Sel. 76; *Johnson v. Jenkins*, 30 April, 1832, MS. 1 Dowl. P. C. 367, S. C.; *Build v. Wightman*, Id. 545; *Fletcher v. Smith*, 2 W. Bl. 1301; *Todd v. Dodd*, 1 Wils. 312; *Todd v. Todd*, Barnes, 48, S. C.

(r) *Gee v. Lane*, 15 East, 592; *Raw v. Alderson*, 7 Taunt. 453, 1 Moore, 145, S. C.; *Gainsborough v. Follyard*, 2 Str. 1121, post, 501.

(s) *Gladwin v. Scot*, Barnes, 53.

(t) *Anon.* 1 Salk. 117.

(u) *Anon.* 1 Show. 89; *Hartford v. Mattingly*, 2 Chit. Rep. 117.

*White & Wife* (x), the Court of King's Bench, on an affidavit entitled as against both husband and wife, gave the plaintiff leave to file common bail for, and enter up judgment against the husband and wife, on a warrant of attorney executed by the wife, *feme sole*; and the rule was made absolute in the first instance, though the master suggested a doubt thereto, whether it ought not to have been a rule *nisi*. If a warrant of attorney be given to a *feme sole*, her subsequent marriage will not be a revocation of it (y); and upon application to the Court, founded upon a proper affidavit of the marriage, the execution of the warrant of attorney, and the non-payment of the debt (z), they will allow the judgment to be entered up in the name of the husband and wife (a).

*When ordered to be given up.*] If the warrant of attorney have been obtained by fraud (b), or upon an usurious consideration (c), or for a gambling debt (d), (unless the defendant represented to the plaintiff before he purchased the debt, that it was a valid one (e),) or to defraud creditors, and the application be made on their behalf (f), or if given to the plaintiff to induce her to live in a state of prostitution with the defendant (g), or expressly for creating a charge on an ecclesiastical benefice (h), or for securing an annuity void by the annuity act (i), or for securing an attorney future costs (j), or the like (k), the Court will order the warrant to be delivered up to be cancelled; or, if judgment have been entered up, they will set it aside, and any proceedings that may have been had upon it. If the fact of the consideration, however, be fairly contested, the Court will direct an issue to try it, and enlarge the rule for setting aside the judgment, in the mean time (l). So, if it be alleged that the warrant of attorney is forged, or the like, the Court will direct an issue to try whether it has been duly executed or not (m). But, where a joint warrant of attorney had been altered after its execution, in the christian name of one of the parties, who had re-executed,

(x) K. B. 24 June, 1829.

(y) *Anon.* 1 Salk. 117.

(z) *Murder v. Lee*, 3 Bur. 1469; *Metcalfe v. Boote*, 6 D. & R. 46.

(a) *Anon.* 7 Mod. 53.

(b) *Duncan v. Thomas*, 1 Doug. 196; *Fell v. Riley*, 1 Cowp. 281, 3 T. R. 616; *Bagley v. Taylor*, 3 D. & R. 56; *Martin v. Martin*, 3 B. & Adol. 934.

(c) *Roberts v. Giff*, 1 B. & Ald. 92; *Cook v. Jones*, 2 Cowp. 727; *Machin v. Delaval*, Barnes, 52; *Flight v. Chaplin*, 2 B. & Adol. 112. See *Hindle v. O'Brien*, 1 Taunt. 413. This Court does not, as the Common Pleas does, usually compel the defendant to pay the principal and interest as part of the terms of the rule.

(d) See *George v. Stanley*, 4 Taunt. 633.

(e) *Davison v. Franklin*, 1 B. & Adol. 142.

(f) *Harrod v. Benton*, 2 M. & R. 130, 8 B. & Cres. 217, S. C.; *Martin v. Mar-*

*tin*, 3 B. & Adol. 934; *Sharpe v. Thomas*, 6 Bing. 416; *Rogers v. Kingston*, 10 Moore, 97, 2 Bing. 441, S. C.; *Dukes v. Saunders*, 1 Dowl. P. C. 522.

(g) *Tidd*, 547.

(h) *Flight v. Salter*, 1 B. & Adol. 673; *Kirklev v. Butts*, 2 B. & Adol. 736 n.; *Britten v. Wait*, 3 B. & Adol. 915; *Colebrooke v. Layton*, 1 Nev. & M. 374; *Aberdeen v. Newland*, 4 Sim. 281.

(i) *Exp. Chester*, 4 T. R. 694; *Stedman v. Purchase*, 6 Id. 737; *Nash v. Godmund*, 1 B. & Adol. 634; in which case the defendant had to pay the costs of the judgment and motion, &c.

(j) *Jones v. Hunter*, 1 Dowl. P. C. 462; *Holdsworth v. Wakeman*, Id. 532.

(k) See *Jackson v. Davison*, 4 B. & Ald. 691.

(l) *Cook v. Jones*, 2 Cowp. 727; *Harrod v. Benton*, 8 B. & Cres. 217, 2 M. & R. 130, S. C.

(m) *Gibson v. Bond*, Barnes, 239.

ed the same, without the knowledge of the other, the Court refused, on the application of the former, to set aside the judgment which had been signed thereon (*n*). Also, if a warrant of attorney be given by an infant, the Court will order it to be delivered up to be cancelled, even although there may be circumstances of fraud on the part of the infant (*o*). But if an infant and another join in a warrant of attorney, and judgment be entered up against both, the judgment may be vacated as to the infant, and remain good as to the other (*p*). So, if a *feme covert* give a warrant of attorney, the Court will order it to be delivered up to be cancelled, or will set aside the judgment, &c.; the warrant, in such a case, being absolutely void (*q*); and on motion, the Court set aside a judgment on a warrant of attorney given by a *feme covert*, although she had been divorced *a mensa et thoro* (*r*); yet the Court have refused to relieve her, where at the time she executed the warrant she lived by herself and acted as a *feme sole* (*s*). Also where one of several executors gave a warrant of attorney to confess a judgment against all, the Court ordered it to be delivered up to be cancelled (*t*). If the warrant be not altogether void, but good as to part and bad as to the residue, the Court will only destroy the effect of the bad part (*u*). The Court in general give the successful party his costs.

*In what cases filed, &c.*] The warrant of attorney, or a true copy thereof, and of the attestation thereof, and of the defeazance and indorsements thereon, and an affidavit of the time of the execution of such warrant of attorney, must be filed with the clerk of the judgments, within 21 days after its execution, to render such warrant of attorney, or any judgment or execution thereon, valid as against the assignees of the defendant, if he should become bankrupt. (3 G. 4, c. 39, s. 1, 2). Pay 1s. And, if afterwards the debt be satisfied or discharged, a Judge, upon being satisfied of that fact, may order a memorandum of satisfaction to be written on the warrant of attorney, or copy filed. (3 G. 4, c. 39, s. 8). See also the other provisions as to cognovits, *ante*, 489, and the points and decisions there, which will, it seems, apply to warrants of attorney. An affidavit made by an attesting witness to the warrant of attorney, and filed with it, merely stating its date, and that he saw the party execute the same, without verifying the day on which it was executed, has been deemed insufficient under the above act (*v*).

The 7 G. 4, c. 57, s. 33, extends these provisions in favour of the creditors of an insolvent debtor. But it being questionable whether warrants of attorney, executed by insolvent debtors before adjudication by the insolvent court, were to be deemed secret warrants of at-

(*n*) *Coke v. Brummell*, 2 Moore, 495, 8 Taunt. 439, S. C.

(*o*) *Saunderson v. Marr*, 1 H. Bl. 75; MS. M. 1814; but see *George v. Stanley*, 4 Taunt. 683.

(*p*) MS. M. 1814. See *Motteux v. St. Aubin*, 2 W. Bl. 1133.

(*q*) *Oulds v. Sansom*, 3 Taunt. 261.

(*r*) *Faithorne v. Blaguire*, 6 M. & Sel.

73.

(*s*) *Anon.* 1 Salk. 400; and see *Wilkins v. Wetherill*, 3 B. & P. 220, *ante*, Vol. 1, p. 71, 72.

(*t*) *Edwell v. Quash*, 1 Str. 20.

(*u*) See *Holdsworth v. Wakeman*, 1 Dowl. P. C. 532.

(*v*) *Dillon v. Edwards*, 2 M. & P. 550.

torney within the 3 G. 4, c. 39, it was enacted by the 1 W. 4, c. 38, s. 3, that such warrants of attorney should not be within that act, and that the same should be deemed valid.

*Judgment, when to be signed.*] Judgment may be entered up on a warrant of attorney, at the time therein specified for that purpose; and if the warrant were given to secure the payment of money, it is not necessary that the plaintiff should delay the signing of the judgment until default be made in the payment (*x*), unless that be expressly stipulated in the defeazance (*y*). And if the warrant be given for a sum certain, to indemnify the plaintiff against the payment of a smaller sum, the plaintiff need not defer signing judgment and issuing execution until the contingency happen (*z*). If the defeazance state that it is given to secure the payment of a sum on demand, and in case default shall be made, then judgment to be entered up and execution issued; an actual demand must be made, and a proposal to settle amicably does not amount to such demand (*a*). In a late case, where the warrant of attorney was given with a defeazance, stating it to be given as a security for a certain sum, and interest thereon, the Court held that it was to be construed as a continuing security, and not merely as a security for money then due (*b*).

If the warrant specify any particular term of which the judgment is to be signed, it cannot be entered up of any other, even of a subsequent term (*c*); which exactness, however, is seldom requisite at present; for modern warrants of attorney, after specifying the term of which judgment is to be signed, always add the words "*or of any subsequent term.*" It cannot, however, be entered up of a previous term; and even if the first day of the term of which the judgment is signed, and to which the judgment has relation, be previous to the time stipulated in the defeazance for the entry of the judgment, although judgment were not actually signed until afterwards, the Court would probably set aside the judgment (*d*).

Within a year and day from the date of the warrant of attorney, judgment may be entered up as of course, without the leave of the Court. But after a year and day from such date, judgment cannot be entered up until leave of the Court in term time, or of a Judge in vacation, is obtained, for that purpose (*e*). The application for such leave is founded upon an affidavit, stating the consideration for the warrant of attorney; its execution; the amount remaining due to the plaintiff (*f*); and alleging positively (*g*) that the defendant was

(*x*) MS. M. 1814; and see *Anon.* Hardw. 270.

(*y*) See *Nicholl v. Bromley*, 2 B. & B. 464, 5 Moore, 307, S. C.

(*z*) *Barber v. Barber*, 3 Taunt. 465; and see *Puttridge v. Fraser*, 7 Id. 307, 1 Moore, 54, S. C.

(*a*) *Nicholl v. Bromley*, 5 Moore, 307, 2 B. & B. 464, S. C.

(*b*) *Woolley v. Jennings*, 5 B. & Cres. 165, 7 D. & R. 324, S. C.; and see *Sto-vel v. Eade*, 4 Bing. 154.

(*c*) *Mynn's case*, 1 Mod. 1; *Anon* 7 Id. 53.

(*d*) See *Calvert v. Tomlin*, 5 Bing. 4, 2 M. & P. 1, S. C. *Aliter* as to cognovits. *Id. ante*, 486, n. (*a*).

(*e*) *Anon.* 6 Mod. 212; *Lushington v. Waller*, 1 H. Bl. 94.

(*f*) *Hulke v. Pickering*, 4 D. & R. 5, 2 B. & C. 555, S. C.; R. H. 2 W. 4, r. 73.

(*g*) — *v. Hobson*, 1 Chit. Rep. 314; *Juliet v. Harper*, 1d. 617, (*a*).

alive at a certain time therein mentioned (*h*). The affidavit may or may not, it seems, be entitled in the cause in which the judgment is entered up. (*i*). If the application be by motion to the Court, it must appear, from the affidavit, that the defendant was alive, either from the deponent's having seen him, or otherwise, upon some day within the term, in order that the Court may be satisfied that he was alive on the day to which the judgment will have relation; and where the motion was made on the first day of term, and the affidavit stated the defendant to have been alive four days before (*k*), and even where it stated him to have been alive on the essoign day of term, the Court held it to be insufficient, saying, that it must appear from the affidavit that the defendant was alive on some day in full term (*l*). If the application be made to a Judge in vacation, the affidavit must state the defendant to have been alive within two or three days, if he reside in or near London; or, if he reside at a distance in the country, then within six or eight days, according to the distance. Judgment, however, has been allowed to be entered up against a defendant residing in Jamaica, upon an affidavit that he was alive four months before (*m*); and against a defendant in New South Wales, upon an affidavit stating the receipt of a letter from him, dated from that place in the August preceding, the application being made in November (*n*), and that deponent then verily believed him to be still alive. It must appear, also, that the deponent saw him at the time he is stated to have been alive; or that he received a letter from him in his handwriting, bearing date at the time (*o*); and, therefore, where the affidavit stated merely, that the deponent was told by the defendant's wife that her husband was living, the Court held it to be insufficient (*p*). If several persons join in the warrant, it must, in general, be sworn that they are all alive (*q*): when otherwise, *see ante*, 495. In support of the application, as already observed, there must also be an affidavit by the attesting witness, stating the execution of the warrant of attorney. The circumstance of the commissioner, before whom the affidavit that the party is alive is sworn, being the attesting witness, does not dispense with the necessity of an affidavit by him of the execution of the warrant (*r*); but where the affidavit stated that the defendant had recently acknowledged the execution, expressly for the purpose of enabling the plaintiff to enter up judgment without being at the trouble of sending for the subscribing witness, the Court of Common Pleas held it to be sufficient (*s*); though, indeed, this Court have decided otherwise (*t*). If the attesting witness be dead,

(*h*) See the form of the affidavit, Chit. Forms, 338.

(*i*) *Sowerby v. Woodroffe*, 1 B. & Ald. 567, 1 Chit. 315, S. C.; *Poole v. Robberds*, Id. 568, n.; *Ex p. Gregory*, 8 B. & Cres. 409.

(*k*) MS. H. 1815.

(*l*) *Eyles v. Warren*, 4 M. & Sel. 174, 1 Chit. 617, S. C.; *Whittaker v. Whittaker*, 8 B. & Cres. 768; *Price v. Hughes*, 1 Dowl. P. C. 448; *Wiles v. James*, Id. 498. See *Reg. Gen.*, 1 B. & B. 385.

(*m*) *Rowndell v. Powell*, Willes, 66.

(*n*) *Hopley v. Thornton*, 2 D. & R. 12; and see *Pemberton v. Brocuving*, 2 Bing. 204, 9 Moore, 389, S. C.

(*o*) *Bidlake v. Carter*, MS. E. E. 1824; *Sanders v. Jones*, 1 Dowl. P. C. 307.

(*p*) MS. M. 1824; — *v. Hobson*, 1 Chit. Rep. 314.

(*q*) — *v. Hobson*, 1 Chit. Rep. 314.

(*r*) *Feld v. Beaucroft*, 10 Law J. 81, 1 Dowl. P. C. 308, 2 C. & J. 217, S. C.

(*s*) *Liang v. Kaine*, 2 B. & P. 85.

(*t*) *Jones v. Knight*, 1 Chit. Rep. 743.



that fact must be substantiated by affidavit, or, if he cannot be found, the affidavit must state the endeavours which have been made to find him, before the Court will receive secondary evidence of the execution (u). It seems the Court will by rule compel the attesting witness to swear to the execution (x). The *consideration*, and the *sum remaining due*, are usually sworn to by the plaintiff himself; but where the plaintiff was a lunatic, an affidavit of the debt being unpaid, made by a person who had received the interest due upon it for the last three years, was deemed sufficient (y). Where it appeared by the plaintiff's affidavit that she was then resident in an enemy's country, the Court of Common Pleas refused to give leave to enter up the judgment (z). If the application be made *within ten years* after the execution of the warrant, the Court will in general grant a rule absolute in the first instance. If ten years or upwards have elapsed the Court will only grant a rule *nisi* (a). And where judgment had not been entered up within a year and a day on a warrant of attorney, given with a *post obit* bond, and no application was made by the obligee to enter it until after the death of the person on whose death it was payable, the Court granted a rule *nisi* only (b). Although judgment happen to be entered up without the leave of the Court or a Judge when necessary, yet none but the defendant himself can object to the irregularity (c).

*Judgment, how signed, &c.*] Where leave of the Court is necessary, before you can enter up judgment, if in term time, *give the affidavit abode mentioned and a motion paper, to counsel, who will move it accordingly; draw up the rule with the clerk of the rules; pay him 5s.* If in vacation, *take the affidavit to the Judge's chambers, who will make an order thereon; pay him 6s. 6d.; then get a motion paper signed by counsel, and take it and the order to the clerk of the rules, who will thereupon draw up the rule (d).* *Make an incipitur of the declaration on plain paper, and (if judgment be entered up with leave of the Court or a Judge) annex the rule or order to it; make an incipitur also on the roll, intitling the roll of the term of which the judgment is to be entered up (e).* *Then enter an appearance for the defendant as usual, as directed, Vol. 1, 454, (R. H. 1 W. & M.). Lastly, take the judgment paper, roll, and warrant of attorney, to the clerk of the judgments who will sign the judgment, and file the warrant (f).* No judgment can be signed upon any warrant authorising an attorney to confess judgment without such warrant being delivered to and filed by the clerk of the docket, who is to file the same in the

(u) *Waring v. Bowles*, 4 Taunt. 132; *Jones v. Knight*, 1 Chit. Rep. 743; and see *Appleton v. Bond*, *id.* 744.

(x) *Clark v. Elwick*, 1 Stra. 1; *Coffin v. Idle*, M. 3 G. 4, K. B., Tidd, 9th ed. 554.

(y) *Coppendale v. Sunderland*, Barnes, 42.

(z) *De Lamerille v. Phillips*, 2 New Rep. 97.

(a) R. H. 2 W. 4, r. 73; and see 1 Chit. Rep. 618 n, 2 B. & Cres. 555, 4 D.

& Ry. 5, S. C.

(b) *Lushington v. Waller*, 1 H. Bl. 94.

(c) *Jones v. Jones*, 1 D. & R. 558.

(d) See the form of the rule, Chit Forms, 400.

(e) The memorandum or minute of warrant as formerly used to enter up the judgment is disused in consequence of the statute 5 G. 4, c. 41.

(f) See the form of the entry, Chit. Forms, 400.

ings on the roll, with the suggestion of the breaches, and make and serve a copy of such breaches, and the notice of the inquiry, as directed *supra*. Then sue out a writ of inquiry, as directed *ante*, 513, to be executed before the Chief Justice at the sittings, or the Judges of assize at the assizes, according to the county in which the venue was laid (n); deliver it with the rule to the sheriff, who will thereupon summon a jury, will annex the panel to the writ, and deliver the writ and panel to the associate. And lastly, you must make out a copy of the record on plain paper or parchment, for the Chief Justice or Judges of assize, and leave it with the marshal when you enter the cause. If you desire to have a better sort of common jury, see *ante*, 514. When the cause is called on, the inquest is taken precisely in the same manner as a cause is tried at *Nisi Prius*.

As to the evidence on executing a writ of inquiry in general, see *ante*, 517. The plaintiff need not prove the breaches if they have been assigned, or any averments contained in the declaration. But he must prove all averments and breaches (if any) that have been suggested in the record after judgment (o). In a late case, in an action on a bond, against a surety, it was held that if non-payment by the principal, after notice in writing required by the condition, be averred in the declaration, and the defendant suffer judgment by default, it is not necessary to give evidence of the notice, because the allegations of the declaration are not put in issue; though, if the breach be suggested in the record under the statute after judgment, it would be otherwise (p). So, on the execution of the writ of inquiry after judgment on demurrer, the execution of an instrument, which the defendant has stated in setting out the condition of the bond in his plea, need not be proved (q). Where, in debt on bond conditioned for the performance of covenants in an indenture, &c., or of an award, judgment is suffered to pass by default, and breaches are suggested, the plaintiff must prove the condition of the bond, the award, indenture, &c., as well as the breaches (r).

The 3 & 4 W. 4, c. 42, s. 18, provides, That, at the return of the writ, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy, before whom the writ was executed, shall certify under his hand (s), upon such writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court for a new inquiry, or a Judge of any of the said Courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order.

If the inquiry was executed before the sheriff, the inquisition and return will be framed (t), and procured as directed, *ante*, 519. You may then proceed to tax your costs, and sign judgment as you would upon a verdict of a jury after a trial before the sheriff on a cause of action not exceeding £20, as directed *ante*, Vol. I, 319. If it was executed before the Chief Justice or Justices of assize, the associate will prepare the inquisition, and have it sealed with the seal of the Chief Justice or Justices of assize, and annex it to the writ of in-

(n) See the forms, Chit. Forms, 430; and see *ante*, 513.

(o) See 1 Saund. 53 a, 5th ed.

(p) *Barwick v. Russell*, 3 C. & P. 608.

(q) *Collins v. Rybot*, 1 Esp. Rep. 157.

(r) 1 Saund. 59 d. See *Bartlett v.*

*Pentland*, 1 B. & Adol. 704.

(s) See a form, Chit. Forms, 421; but instead of the words "to set aside the execution of the within writ," say "for a new writ of inquiry."

(t) See the form, Chit. Forms, 431.

quiry. You may then proceed to tax your costs, and sign judgment as upon a *postea*, as directed *ante*, Vol. 1, 316, 318.

The remaining proceedings are entered upon the roll, thus:—after the award of the writ of inquiry, make an entry of the return of it and of the inquisition; then follows the judgment for the debt, damages, and costs, as in the usual form in debt; then an award of a writ of execution against the defendant's goods, lands, or person; and, lastly, if the writ be executed, follows the entry of the sheriff's return to the writ of execution, and of an acknowledgment of satisfaction by the plaintiff as to the amount levied (2). The judgment above mentioned includes the costs of the inquiry, but not the damages given by the inquest (a).

The writ of execution must of course pursue the judgment, and be for the penalty, nominal damages and costs, but it must be indorsed to levy only the damages given by the inquest and costs of increase, together with the reasonable charges and expenses of executing the writ (b).

*Proceedings after judgment on demurrer or nul tiel record.*] The proceedings are the same as when judgment is allowed to pass by default. The judgment for plaintiff upon demurrer, &c., in debt is entered, omitting the latter words of it, in the same manner as in the judgment by default above mentioned; then follows the suggestion of breaches, if the breaches have not already been assigned in some of the previous pleadings. The remainder of the proceedings are the same as above stated.

*Proceedings upon issue joined.*] The best way of declaring on a bond, &c. of the description above mentioned, particularly if you expect to obtain a judgment by default, is to set forth in the declaration the condition of the bond, and assign the breaches therein. But the usual mode of declaring is, to declare as upon a common money bond (c); the defendant, if he pleads, then usually sets forth the condition upon *oyer*, and pleads *performance*; the plaintiff in his replication states the breaches; and the defendant in his rejoinder takes one issue on each of them. As soon as issue is joined, the paper book, with an award of a *venue*, is made up, delivered and returned in the usual way; and the issue is tried as in ordinary cases. If the defendant, however, instead of pleading performance, plead any other plea which cannot lead to an issue upon the breaches, but upon which the plaintiff, if he recovers, must have judgment *quod recuperet*, if, for instance, to a declaration as upon a common money bond, he plead *hoc est factum* (d), or *non est factum* and that the bond was obtained by fraud and covin (e), or the like, the plaintiff in making up the issue, immediately after entering the pleadings, must suggest the breaches, and then enter the award of the *venue* (e). Or if the issue have been already delivered without the suggestion, then to take out a summons before a Judge, for the defendant to show cause why a suggestion of breaches should not be entered on the record; and upon the Judge's order being obtained for

(2) See the form of the entry, Chit. Forms, 432; 1 Saund. 58 c; 2 Id. 117.

(a) See *Hankin v. Broonhead*, 3 B. & P. 607.

(b) 1 Saund. 58 b, (n. 1). See the form, Chit. Forms, 432.

(c) See, as to the advantages of each mode of declaring, 2 Chit. Pl. 5th ed. 440 a.

(d) *Ethersey v. Jackson*, 8 T. R. 255.

(e) *Homfray v. Rigby*, 5 M. & Sel. 60.

## CHAPTER III.

## JUDGMENT BY DEFAULT.

*What, and in what cases.]* WHEN a defendant hath a day certain given him in Court, and is then demandable, and being demanded doth not appear, the Court thereupon give judgment against him by default (a).

The defendant allows judgment to go by default, either intentionally, or through mistake or neglect; intentionally, where he has no merits, or when he does so according to a previous agreement with the plaintiff; through mistake, when he puts in a plea, or rejoinder, &c., so informal or defective, that it is treated as a nullity; and through neglect, when perhaps he has merits, but he neglects to plead, rejoin, &c. or return the paper book, within the time limited by the rules of Court for that purpose. This is also an implied confession of the action.

Judgment by default is either by *nil dicit*, that is, where the defendant is stated to have appeared, but to have said nothing in bar or preclusion of the action;—or by *non sum informatus*, where he is said to appear by attorney, but the attorney says that he is not informed by the defendant of any answer to be given. The latter is used only in cases where judgment is entered in pursuance of a previous agreement between the parties; the former, where the defendant has not pleaded within the time limited by the rules of the Court, or in a proper manner, or where he has pleaded some plea not adapted to the nature of the action or circumstances of the case, or the like (b). *As to judgment for want of a plea, and where the plea, from some irregularity in the form of it, or in the manner or time of pleading it, may be treated as a nullity, see Vol. 1, 202 to 205, 209; as to judgment for want of a rejoinder, rebutter, &c., see Vol. 1, 213; and as to judgment for not returning the paper book, see Vol. 1, 218; or for not returning the demurrer book, see ante, 477.* If a plea be pleaded, but it do not answer the whole of the declaration, you may in general sign judgment by *nil dicit* for the part not answered, and proceed in the action for the residue. The rule upon this subject is thus:—If a plea begin as an answer to part only, and is in truth an answer only to that part (c), or if it begin as an answer to part, but afterwards answer

(a) *Morrice v. Green*, 3 Salk. 213.

(b) See forms of judgment by *non sum informatus*, Chit. Forms, 411.

(c) 1 Saund. 28, n. (1, 2, 3); 1 Chit. Pl. 5 ed. 554; *Clarkson v. Lawson*, 6 Bing. 395, 206, 4 M. & P. 356, S. C.

more (d), the plaintiff should sign judgment for that part of the cause of action which the plea in its commencement does not profess to answer; otherwise, if, instead of doing so, he demur or plead over, the whole action will be discontinued. If, on the contrary, the plea begin as an answer to the whole, but in truth be only an answer to part, the plaintiff cannot sign judgment for the part not answered, but should demur, because the whole plea is bad (e). If the defendant make default at the trial, this is not such a default as will entitle the plaintiff to sign judgment; but he must proceed regularly to verdict and judgment, in the same manner as if the action were defended.

Where judgment by default is signed as to part, and issue is joined as to the residue, a special *venire* is always awarded, *tam ad triandum quam ad inquirendum*, as well to try the issue as to inquire of the damages; and the jury who try the issue, in that case, assess the damages for the whole (f). So, where there are several defendants, if some let judgment go by default, and others plead to issue, a similar special *venire* should be awarded, and the jury who try the issue should assess the damages against all the defendants (g). But in actions where the plea of one defendant *enures* to the benefit of all, as in actions upon contracts (h), if the plaintiff fail of obtaining a verdict against those who have pleaded, he cannot have damages assessed against the others who let judgment go by default; for the contract being entire, the plaintiff must succeed against all the defendants or none (i). In actions *ex delicto*, on the contrary, if the plaintiff do not succeed against the defendants who plead, he may still have his damages assessed against those who allowed judgment to go by default (k), unless the plea of those who pleaded prove that the plaintiff could have no cause of action against any of them (l), for the *tort* is several, as well as joint (m).

Judgment by default is interlocutory, in *assumpsit*, covenant, trespass, case, and replevin, where the sole object of the action is damages; but in debt and ejectment, damages not being the principal object of the action, and those usually recoverable not being of sufficient consequence to warrant the expense of executing a writ of inquiry, the plaintiff usually signs final judgment in the first instance. But even in debt the plaintiff must, as we shall hereafter see, in some instances in actions on bonds, execute an inquiry; and sometimes, though not necessary, it may be advisable for him to execute it. (*See post*, 509).

(d) 1 Saund. 28, n. 3; *Woodward v. Robinson*, 1 Str. 303; but see *Gray v. Pindar*, 2 B. & P. 427.

(e) 1 Saund. 28, n. 1, 2, 3, 296, n. 1; *Everard v. Paterson*, 6 Taunt. 646; 2 Marsh. 304, S. C.; *Thomas v. Heathorn*, 2 B. & Cres. 477; 3 D. & R. 647, S. C.; *Clarkson v. Lawson*, 6 Bing. 266; *Crumph v. Adney*, 1 C. & M. 362.

(f) 11 Co. 5. See the form of the award of the *venire*, Chit. Forms, 119.

(g) 11 Co. 5; *Dicker v. Adams*, 2 B. & P. 163. See the form of the award of

the *venire*, Chit. Forms, 118.

(h) *Porter v. Harris*, 1 Lev. 63; *Boutter v. Ford*, 1 Sid. 76; Ca. Pr. C. B. 107; Pr. Reg. 102; *Hannay v. Smith*, 3 T. R. 662.

(i) See a form of judgment in such a case, Chit. Forms, 410.

(k) *Jones v. Harris*, 2 Str. 1100; *Cressy v. Webb*, Id. 1222.

(l) *Biggs v. Bengier*, 2 Ld. Raym. 1372, 1 Str. 610, S. C.; 8 Mod. 217.

(m) See form of judgment in such a case, Chit. Forms, 410.

*How signed.*] Judgment for want of a plea cannot be signed, until the defendant is fully before the Court. In bailable actions, therefore, if the defendant have not perfected bail, the plaintiff can only proceed against the sheriff, or upon the bail bond, to compel an appearance; but, in nonbailable actions, if the defendant have not entered an appearance within the time limited for that purpose by the rules of the Court, the plaintiff may do it for him in pursuance of the statute, and afterwards sign judgment by *nil dicit*, if the defendant have not pleaded within the time allowed him for that purpose. (*Vol. 1*, 185, 202). If judgment is to be signed for want of a rejoinder or rebutter, &c., this being deemed an abandonment of the plea, the plaintiff strikes out all the previous pleadings, and signs judgment as for want of a plea. (*Vol. 1*, 214) (n). The judgment may be signed in vacation, (*R. T. 29 Car. 2, r. 5*), but not on a *dies non* (o).

After entering an appearance for the defendant, when necessary (p), then, if your judgment is to be interlocutory merely (*vide ante*, 504), make an incipitur of your declaration on plain paper, and an incipitur on the roll; take them to the clerk of the judgments, and he will sign the judgment (q). Having signed interlocutory judgment, you may proceed to sue out and execute your writ of inquiry, as directed in the next chapter. If your judgment is to be final (*see ante*, 504), make an incipitur of your declaration on plain paper, and an incipitur on the roll; take the judgment paper and roll to the clerk of the judgments, and he will sign judgment; then take them to the master, who will tax the costs, and mark them on the judgment paper (r), give the defendant the usual one day's notice before taxing the costs as directed, *ante*, *Vol. 1*, 319. No rule for judgment is necessary. In actions of debt, however, within the statute 8 & 9 W. 3, c. 11, s. 8, such as on a bond for the performance of covenants, for the payment of money by instalments, or of an annuity, or the like (*see post*, Chap. 4, s. 3), if the defendant suffer judgment to go by default, although in strictness this is a final judgment, and entered up for the entire penalty of the bond, yet the plaintiff cannot sue out execution for the sum recovered by the judgment, but he must suggest breaches upon the roll, from time to time, as they occur, and execute a writ of inquiry in order to assess damages on them. (*See post*, Chap. 4, s. 3).

After judgment by default, the entry of any subsequent continuances is not requisite (*R. H. 2 W. 4, reg. 105*), (s).

*Costs.*] The plaintiff is entitled to his full costs, upon judgment by default, in all cases where he would be entitled to damages if he obtained a verdict, by the *stat. Gloucester* (*post*, Book 4, Part 1, Chap. 30);

(n) *Petrie v. Fitzroy*, 5 T. R. 152.

(o) *Harrison v. Smith*, 9 B. & Cres. 243.

(p) *See* Chit. Forms, 342.

(q) *See* the various forms of the entries of judgment by default, Chit. Forms, 402 to 412; and *see* the form of the jury process in these latter cases,

where judgment by default is only as to part or by one defendant, Chit. Forms, 118, 119.

(r) *See* the form of the entry of judgment in debt, Chit. Forms, 465.

(s) *See* Tidd, 9 ed. 678; Jervis's Rules, 97.

and this, although the damages given by the inquest upon the writ of inquiry be less than 40s.; for the statutes upon that subject extend to damages given by a jury only, and not to those given by an inquest. (*See post*). If there be two defendants, however, one of whom pleads, and the other suffers judgment by default, if the plea pleaded be a complete bar to the action, as against both defendants, it seems the plaintiff cannot have his costs against the defendant who suffered judgment by default (*t*).

*Execution.*] The execution on a judgment by default is, in general, the same as in ordinary cases. (*See ante*, Vol. 1, 373 to 414). In the case of bankruptcy, however, sometimes the plaintiff, on a judgment by default, cannot avail himself of it to the prejudice of other creditors. (*Ante*, Vol. 1, 395).

*Setting aside or waiving judgment.*] If the judgment itself be irregularly signed, or if any of the previous proceedings upon the part of the plaintiff be irregular, and the irregularity be not waived by any act of the defendant, or if judgment be signed when in fact the defendant has not been guilty of any default, the Court on motion, or a Judge on summons, will set it aside. The application should be made within a reasonable time, and, at all events, not after the defendant has taken any fresh steps after the knowledge of the irregularity. (*R. II. 2 W.A.*, r. 33; *post*, Book 4, Part 1, Chap. 17). If the irregularity be in the delivery, filing, or notice of declaration, then an application, if possible, must be made at least two days before inquiry executed (*u*). Or if the writ of inquiry be executed in vacation, and the defendant intend applying to the Court, notice of the motion should be given two days previously, to the plaintiff's attorney or agent (*v*). At all events, the application should be made before execution executed; and where the defendant had attended and cross-examined witnesses on executing a writ of inquiry, the Court held it too late to move to set aside such judgment (*w*). Taxing costs, and signing final judgment, are considered, in this Court, as contemporaneous acts; and, therefore, the attendance of the defendant or his attorney before the master on taxing costs, is an admission that the judgment was properly signed, and it cannot afterwards be objected to as having been signed too soon (*w*). In setting aside a judgment and execution for irregularity, the Court will in general restrain the defendant from bringing any action of trespass, unless a strong case for damages be shewn (*y*), or the judgment and execution were against good faith (*z*).

(*t*) Hullock, 143.

(*u*) 1 Sellon, 345; *Minster v. Coles*, 2 Chit. Rep. 237; *Moses v. Richardson*, 3 B. & Cres. 421.

(*v*) Tidd, 513, 567; *Gaire v. Goodman*, 2 Smith, 391.

(*w*) *Fraas v. Paravicini*, 4 Taunt. 545; *Gillingham v. Waskett*, M'Clel. 568; *Doe Antrobus v. Jepson*, 3 B. & Adol.

402.

(*x*) Tidd, 9th ed. 930; *Blackburn v. Kymer*, 5 Taunt. 672, 1 Marsh. 278, S. C.; *Butler v. Bulkeley*, 1 Bing. 233, 3 Moore, 104, S. C.

(*y*) *Lorimer v. Lule*, 1 Chit. Rep. 134, 238; *Wentworth v. Bullen*, 9 B. & Cres. 840, 849.

(*z*) *Cash v. Wells*, 1 B. & Adol. 375.

The plaintiff, also, if he find that he has signed judgment irregularly, may *waive* the judgment, by getting the clerk of the judgments to strike it out; and he may give notice thereof to the defendant's attorney, in order to prevent the expense of an application to the Court (a); and he may, it seems, do this, even after application made to set aside the judgment, provided he pay the costs<sup>1</sup> incurred by the defendant in consequence of the irregularity (b).

The Court, also, in some cases, on the defendant's application, will set aside a *regular* judgment, upon an affidavit of merits, if the plaintiff has not lost a trial (c). As it is wholly discretionary, however, in the Court to do this or not, they will not set aside a regular judgment in order to give the defendant an advantage of any nicety of pleading (d), or of any matter which does not go to the merits of the cause (e), or a special plea of questionable matter, designed to draw the plaintiff to demur (f); and the Court of Common Pleas have refused to set aside a regular judgment, where it appeared that the defendant had refused to accede to equitable terms of compromise (g). But a plea of the statute of limitations is now considered a plea to the merits; and, therefore, in the Common Pleas, an interlocutory judgment was allowed to be set aside without restraining the defendant from pleading it (h): so the defendant may plead bankruptcy (i), or infancy (k). When the Court set aside a regular judgment, it is usually upon the terms of the defendant's paying the costs of the application (l), pleading issuably *instantly*, (which means on the same day at all events) (m), taking short notice of trial (n), and giving judgment of the term (o) when necessary; thereby placing the plaintiff in the same situation as though the judgment had not been set aside (p). And in some cases, also, they will order the defendant to bring the money into Court (q); and in all cases of regular judgment will restrain him from bringing an action.

The affidavit of merits must state that the defendant has "a good defence to this action upon the merits" (Vol. 1, 147) (r); and must be made either by the defendant himself, or his attorney, or the clerk of the attorney who has the sole management of the cause (s). An affidavit that the defendant is advised and believes he has "a good and meritorious defence," will not suffice (t); and an affidavit that he has "merits to defend," or "a good defence to the action," will not satisfy the condition of a rule which requires him to swear to a good defence "on the merits" (u).

(a) Imp. B. R. 494, n.

(b) See *post*, Book 4, Part 1, Chap. 17; and see 4 M. & R. 100.

(c) *Wood v. Cleveland*, 2 Salk. 518; *Sisted v. Lee*, 1 Salk. 402.

(d) *Forbes v. Middleton*, 2 Str. 1242.

(e) *Willett v. Atterton*, 1 W. Bl. 35.

(f) *Wood v. Cleveland*, 2 Salk. 518.

(g) *Anon.* 4 Taunt. 855.

(h) *Muddocks v. Holmes*, 1 B. & P. 223.

(i) *Evans v. Gill*, 1 B. & P. 52; *Tidd*, 503.

(k) *Delafield v. Tanner*, 5 Taunt. 356, 1 Marsh. 391, S. C.

(l) *Sisted v. Lee*, 1 Salk. 402. See

*Prudhoe v. Armstrong*, Barnes, 256.

(m) *Tidd*, 9 ed. 567.

(n) *Matthews v. Stone*, Barnes, 242.

(o) *For v. Glass*, 2 Str. 823.

(p) See *Smith v. Biandell*, 1 Chit. Rep. 226; and see *Parker v. Webster*, *Id.* 232.

(q) *Welland v. Rock*, Barnes, 243.

(r) See Chit. Forms.

(s) *Morris v. Hunt*, 1 Chit. Rep. 97.

(t) *Bower v. Kemp*, 1 Dowl. P. C. 202.

(u) *Pringle v. Mursack*, 1 D. & R., 155.



## CHAPTER IV.

## WRIT OF INQUIRY.

- SECT. 1. *Writ of Inquiry in ordinary Cases, 508 to 520.*  
 2. *Reference to the Master, 520 to 522.*  
 3. *Writ of Inquiry in Debt on Bond, 522 to 527.*

## SECTION 1.

*Writ of Inquiry in ordinary Cases.*

*What, and form of, &c.*] A WRIT of inquiry is a judicial writ, directed to the sheriff of a county in which the venue was laid, stating the former proceedings in the cause, and, "because it is unknown what damages the plaintiff hath sustained," commanding the sheriff that by the oath of twelve honest and lawful men of his county he diligently inquire the same, and return the inquisition into Court (*a*).

Formerly, the writ must have been *returnable* in term; but now, by stat. 1 W. 4, sess. 2, c. 7, s. 1, it may be made returnable, and be returned on any day certain, *in term* or *vacation*, and at the return thereof, costs may be taxed, final judgment signed (*b*), and execution issued forthwith, unless the sheriff or other officer before whom the writ was executed, *certifies on such writ*, that judgment ought not to be signed until the the defendant has had an opportunity to apply to the Court to set aside the execution of such writ, or unless one of the Judges orders the execution of such writ to be stayed, until a day named in such order; and if the signing of judgment on such writ of inquiry be postponed, by reason of such certificate or order, or by the choice of the plaintiff, or otherwise, and judgment be afterwards signed thereon, such judgment is to be entered of record as to the day of the return of such writ, unless the Court otherwise direct. The act also (*c*) enacts, that the execution may be *tested* on the day of issuing it (*d*); but, nevertheless, the Court may set aside the

(a) See the forms of writs of inquiry, Chit. Forms, 414, 415; the like into a county palatine, Id. 415.

(b) The act provides that a rule for judgment may be given; but by the late rule of H. T. 2 W. 4, r. 67, such rule is unnecessary, and judgment may be signed after the expiration of four

days from the return of the inquiry without such rule.

(c) Sec. 3, 4.

(d) See also 3 & 4 W. 4, c. 67, s. 2, which allows the execution to be made returnable immediately after the execution is executed.

final judgment, and grant a new inquiry, and thereupon, the party affected by the execution, may be restored to all that he may have lost thereby, in such manner as upon the reversal of a judgment by writ of error, or otherwise, as the Court may direct. In order to enable the plaintiff to avail himself of the advantages of this act, he should make the writ of inquiry returnable in vacation, some day immediately after that on which he is certain he will be prepared with his witnesses to execute the same (e). In a late case, after the execution of the writ of inquiry, and judgment and execution thereon under the above act, the Court allowed the defendant to enter a suggestion, to deprive the plaintiff of costs, under a court of request act, and ordered the plaintiff to restore the amount of defendant's costs, at the same time, restraining the defendant from bringing any action (f).

The writ must be executed against all of the defendants, jointly, who have allowed judgment to go by default. If two defendants, even in trespass, suffer judgment by default, and the plaintiff executes writs of inquiry against them, separately, and take several damages against them, it will be irregular; and if final judgment be entered up for those several damages, it will be error (g). The only way the plaintiff has of remedying this evil is, by applying to the Court, before final judgment, to set aside his own proceedings; which they will allow him to do, upon payment of costs (h).

As to the amendment of a writ of inquiry, see *post*, Book 4, Part 1, Chap. 28.

*In what cases necessary, and consequences of want of, &c.*] When the judgment is interlocutory merely, (which is always the case in *assumpsit*, *covenant*, *case*, *trespass* and *replevin*, the sole object of actions being damages, (see *ante*, 504), the plaintiff's title to damages is thereby established; the amount of the damages yet remains to be ascertained. This is usually done by a writ of inquiry. As the inquest, however, is merely for the purpose of informing the conscience of the Court, the Court themselves may, in all cases, if they please, assess the damages, and thereupon give final judgment (i); and it is accordingly the practice, in actions upon bills of exchange and promissory notes, to refer it to the master to compute the amount of principal and interest due on the bill or note, without a writ of inquiry (j); and the same in an action on an award (k), and the same in an action of covenant for non-payment of a liquidated sum (l), as for non-payment of money lent upon mortgage (m), or for non-

(e) Chit. Sum. Prac. 124.

(f) —v.—, MS. Nov. 1832; and see 1 Dowl. P. C. 598.

(g) *Mitchell v. Milbank*, 6 T. R. 199.

(h) *Onslow v. Orchard*, 1 Str. 422; *post*, 519.

(i) *Bruce v. Rawlins*, 3 Wils. 61; *Thelluson v. Fletcher*, 1 Doug. 316, n. 1 Esp. 73, S. C.; *Gould v. Hammersly*, 4 Taunt. 148.

(j) *Shepherd v. Charter*, 4 T. R. 275; 2 Saund. 107, n. (2); and see *Napier v. Schneider*, 12 East, 420; *Gould v. Hammersly*, 4 Taunt. 148.

(k) *Meggison v. —*, Tidd, 571.

(l) *Thelluson v. Fletcher*, 1 Doug. 316, 1 Esp. 73, S. C.; *Wingfield v. Cleverly*, 13 Price, 53.

(m) *Berthon v. Street*, 3 T. R. 326.

payment of rent (*n*), or for the arrears of an annuity (*o*), or the like. But when the computation of damages is not a mere *matter of calculation*, the Court will not refer it to the master, but will put the plaintiff to sue out his writ of inquiry; thus, in an action on a bill of exchange for foreign money (*p*), or on a foreign judgment (*q*), or on a bond to save harmless (*r*), or on a covenant to indemnify (*s*), or on a bottomree bond (*t*), and even in an action upon a judgment recovered on a bill of exchange where interest is sought for (*u*), or in *assumpsit* for a sum certain due upon an agreement (*x*), the Court have refused to refer it to the master (*y*). In cases where the Court will refer it, as when the action is on a bill of exchange or other matter, where the damages are merely the subject of calculation, it is necessary that this appear upon the face of the declaration, and not be mere matter of evidence (*z*); and if one of several counts contain matter of this kind, you can, after a judgment by default, have it referred to the master to compute the damages upon that count, upon your entering a *remittitur damna* as to the others (*a*). As to this reference to the master, *vide post* 520.

But if there be judgment by default as to part, and issue joined as to the residue, or if some of several defendants suffer judgment by default, and others plead to issue, a writ of inquiry is never executed; but a special *venire*, as well to try the issues as to inquire of the damages, is awarded, and the jury who try the issues will assess the damages for the whole. (*Ante*, 504). So, if there be a demurrer to one count, and issue in fact joined on the other, a special *venire* may issue as above mentioned; or the plaintiff, after he has obtained judgment on the demurrer, may execute an inquiry as to that count, and enter a *nolle prosequi* as to the other (*b*); and he may enter the *nolle prosequi* after the damages have been assessed, provided he do so before final judgment (*c*). Or if there be a demurrer as to part, and judgment by default as to the residue, the plaintiff may sue out a writ of inquiry on the judgment by default, and assess contingent damages as to the demurrer; or he may proceed to obtain judgment on the demurrer in the first instance, and then execute a writ of inquiry on both judgments. (*See ante*, 481) (*d*).

In *debt*, the judgment is always final *quoad* the debt, and the damages usually sought for being very trifling, it is not in general worth while to execute a writ of inquiry for them, but the plaintiff may, at once, enter up final judgment, and sue out execution; and

(n) *Byrom v. Johnson*, 8 T. R. 410;  
*Campion v. Cronshaw*, 6 Taunt. 356, 2  
Marsh. 56, S. C.

(o) *Allwright v. Hill*, 2 Chit. Rep. 32.

(p) *Maunsell v. Massacrene*, 5 T. R.  
87.

(q) *Messin v. Massacrene*, 4 T. R. 493.

(r) *Cooke v. Pettit*, 2 Wils. 5.

(s) *Denison v. Mair*, 14 East, 622.

(t) *Tidd*, 571.

(u) *Nelson v. Sheridan*, 8 T. R. 395.  
*See Blackmore v. Fleming*, 7 T. R. 446;  
*Taylor v. Copper*, 14 East, 442; *McClure*,  
*v. Duncan*, 1 East, 436.

(x) *Tidd*, 571.

(y) *Bishop v. Best*, 2 Chit. Rep. 233,  
3 B. & Ald. 275, S. C.

(z) *Osborne v. Noad*, 8 T. R. 648.

(a) *Duperoy v. Johnson*, 7 T. R. 473;  
*Heald v. Johnson*, 2 Smith, 46, 47, (n);  
*Bowden v. Horne*, 7 Bing. 716, 5 M. & P.  
756, S. C.

(b) *Fleming v. Langton*, 1 Str. 532.

(c) *Duperoy v. Johnson*, 7 T. R. 473.  
*See Bowden v. Horne*, 7 Bing. 716, 7 M.  
& P. 756, S. C.

(d) *Barnes*, 229.

this, even in an action on a bail bond (e). So, in debt on a *replevin* bond, where the not making a return of goods distained for rent, was assigned for breach, it was holden that the plaintiff, after signing judgment by default, might sue out execution for the amount of the goods, as indorsed on the *replevin* bond, and of the taxed costs, without executing a writ of inquiry (f). But if the damages be of sufficient consequence to warrant the expense of proceeding for them, the plaintiff may either execute a writ of inquiry for them, or, where they are mere matter of calculation, may apply to have it referred to the master. Thus, in an action of debt on a judgment of many years standing, where the defendant allowed judgment to go by default, the Court held, that the plaintiff was justified in executing a writ of inquiry, to obtain interest on his judgment by way of damages (g). And, in an action of debt for use and occupation, after judgment by default, it seems, that a writ of inquiry is necessary before signing final judgment; and, in an action on the stat. 2 & 3 Ed. 6, c. 13, for not setting out tithes, there must be a writ of inquiry to ascertain the value of the tithes; so, in an action of debt for foreign money, a jury must find the value of the money (h). On the other hand, in an action of debt, (seemingly for goods sold, money lent, or the like, for it is not specified in the report of the case), the Court, upon application, set aside execution upon a judgment by default, upon payment of costs, and referred it to the master to ascertain what was due to the plaintiff (i); and in that case *Le Blanc, J.* intimated an opinion, that a writ of inquiry should, in no case, be executed in an action of debt.

In debt on *bond*, conditioned for the payment of an annuity, or of money by instalments, or for the performance of covenants, or of an award, or of any other specific act, although judgment by default be entered up for the amount of the penalty, yet a writ of inquiry must afterwards be executed, in order to ascertain what damages the plaintiff may have actually sustained by the breach of covenant, &c., complained of. (8 & 9 W. 3, c. 11, s. 8). This, however, does not extend to bail-bonds, *replevin* bonds, bonds of petitioning creditors, or bonds for the payment of a sum of money in gross, or other bonds named, *post*, 522, and *see post*, 522.

And lastly, where the jury, on a trial at *Nisi Prius*, or at bar, act as an inquest,—as, where they are to assess contingent damages on a demurrer, or where they are to assess damages on a judgment by default as to some of the counts of the declaration (k), or where a demurrer to evidence is put in at the trial (l), and the jury omit to assess the contingent damages on the demurrer, or the damages on the judgment by default; or where in trespass or *replevin* against an overseer of the poor, the plaintiff is nonsuit, or the defen-

(e) *Moody v. Phasant*, 2 B. & P. 446.  
(f) *Middleton v. Bryan*, 3 M. & Sel. 155.

(g) *Blackmore v. Fleming*, 7 T. R. 446; *McClure v. Duncan*, 1 East, 436. See *ante*, 510.

(h) *Arden v. Connell*, 5 B. & Ald. 185, 1 D. & R. 529, S. C.; *Brill v. Neale*, 1

Chit. Rep. 627, 3 B. & Ald. 201, S. C.; *Bate v. Hodgetts*, 1 Bing. 102, 7 Moore, 602, S. C.; *ante*, 510.

(i) *Taylor v. Copper*, 14 East, 442.

(k) See *ante*, 504, 510; and *Townsend v. Pool*, Barnes, 228.

(l) Cro. Car. 143.

dant has a verdict, and the jury omit to inquire of the treble damages given to the defendant in such a case by stat. 43 Eliz. chap. 2, sect. 19 (*n*); or where in *quare impedit*, the jury, after finding for the plaintiff, omit to inquire of the value of the living, &c. (*o*):—in all these cases, the omission of the jury to assess the damages, may afterwards, upon application to the Court, be supplied by a writ of inquiry; and the same in all other cases where an attaind would not lie (*p*). But whenever an attaind (now abolished by the stat. 6 Geo. 4, c. 50, sect. 60), would have lain, if the jury had assessed the damages,—as in an ordinary personal action, and the jury find a verdict for the plaintiff, but omit to assess the damages (*q*); or where issue is joined upon a plea in abatement, and the jury, upon finding for the plaintiff, omit to assess the damages (*ante*, 473):—the omission cannot be supplied by a writ of inquiry (*r*). Also, in replevin for a distress for rent, if the jury find for the defendant, but omit to inquire of the arrears of rent, in pursuance of stat. 17 C. 2, chap. 7, this omission cannot be remedied by a writ of inquiry: because the statute requires that the inquiry be made by the same jury who try the issue (*s*). Where in an action for a libel, published in a newspaper, the defendant pleaded the general issue and nine special pleas of justification; and the jury, at the trial, having found a verdict for the plaintiff on the first issue, and on two of the special pleas, without assessing any damages, and for the defendant, on the remaining seven pleas; the Court of King's Bench, upon motion, awarded a writ of inquiry, to assess the plaintiff's damages; on which judgment was entered up for the damages found on the inquiry: a writ of error being afterwards brought in the Exchequer Chamber to reverse the judgment as to the award of the writ of inquiry, the Court holding the verdict on these issues to be void, no damages having been assessed, ordered a *venire de novo* to be awarded to try the first issue, and also the last, so far as related to the two pleas on which the verdict for the plaintiff had been found (*t*). It has been holden, that where a verdict for the plaintiff is void, but the defendant's plea amounts to a confession, the Court will give judgment upon this confession, and award a writ of inquiry to ascertain the plaintiff's damages (*u*).

*Award of*]. Where a writ of inquiry is allowable and necessary, an award of it follows immediately after the entry of the interlocutory judgment, thus:—"But because it is unknown to the Court of our said lord the king now here, what damages the plaintiff hath sustained by means of the premises" [or, where the inquiry is to extend only to

(*n*) Hardw. 138; *Valentine v. Fawcett*, 2 Str. 1021; *Herbert v. Waters*, 1 Salk. 205, 1 Ld. Raym. 59, S. C.; *Dewell v. Marshall*, 2 W. Bl. 921, 3 Wils. 442, S. C.

(*o*) 10 Co. 118; 1 Tidd, 9th ed. 575.

(*p*) See *Eichorn v. Le'maitre*, 2 Wils. 367, Hard. 295.

(*q*) *Clement v. Lewis*, 3 B. & B. 297, Moore, 200, S. C. See Vol. 1, 296.

(*r*) See *Eichorn v. Le'maitre*, 2 Wils. 367.

(*s*) *Herbert v. Waters*, 1 Salk. 205, 1 Ld. Raym. 59, S. C. See *Freeman v. Archer*, 2 W. Bl. 763.

(*t*) *Lewis v. Clement*, 3 B. & Ald. 702; and see *Clement v. Lewis*, 3 B. & B. 297; 7 Moore, 200, S. C.

(*u*) Cro. El. 214; Carth. 370.

some of several counts, they must be particularized, as thus: “by means of the not performing the said promise and undertaking in the said first count mentioned (x),] “the sheriff is commanded, that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire, &c.” (y). If the award of the writ, of inquiry on the roll be right, the *teste* of the writ, if wrong, may be amended by it (z). Where a writ of error is brought in the House of Lords upon a judgment for the defendant, and the judgment is reversed, we have seen (*Fol.* 1, 361), that upon the record being remitted to this Court, a writ of inquiry is awarded here to ascertain the plaintiff's damages, the House of Lords having no power to award a writ of inquiry (a).

*How sued out, and left with the sheriff.] Engross the writ on plain parchment; get it sealed; pay 7d. It need not be signed. Indorse on it a memorandum of the day on which it is to be executed; and leave it at the sheriff's office the day before, at latest. (R. II. 23 G. 3.) Pay 1l. 9s. 4d. in London, 1l. 10s. 4d. in Middlesex, and 1l. 11s. 6d. in other counties. Pay also 4d. additionally for each witness.*

*Before whom to be executed.]* The writ is usually executed before the sheriff or his deputy (b). It may, however, under special circumstances, by leave of the Court, be executed before the Chief Justice, if the venue have been laid in Middlesex, or London; or by leave of the Court or a Judge, before a Judge of assize as an assistant to the sheriff, if the venue were laid in any other county (c). It is only, however, where some difficult point of law is likely to arise in the course of the inquiry, or where the facts are important, that the Court or a Judge will grant this indulgence: and the mere importance of the facts will not, it seems, induce the Court to grant it, when the venue is laid in Middlesex or London (d); for the undersheriff of Middlesex, and the secondary in London, are generally men of experience, and fully competent to conduct a business of this kind. By the 3 & 4 W. 4, c. 42, s. 22, the Court or a Judge may, in a local action, order the inquiry to be executed in another county than that in which the venue is laid, and for that purpose may order a suggestion to be entered on the record, that the inquiry may be more conveniently executed in the other county.

An application to have a writ of inquiry executed before the Chief Justice, must it seems be made to the Court in term time. For this purpose, *make an affidavit of the circumstances, and give it to counsel with a motion paper, to move for a rule nisi; draw up the rule with the clerk of the rules, and serve a copy of it on the opposite attorney; and afterwards move to make it absolute upon an affidavit of service (e).* Draw up the rule with the clerk of the rules; prepare the

(x) See *Hughes v. Alvarez*, 2 Str. 634.

(y) See the form, Chit. Forms, 402.

(z) See *Johnson v. Toulmin*, 4 East, 173.

(a) *Vickers v. Haydon*, 2 Cowp. 843. See Chit. Forms, 225, 230, 236.

(b) See *Wallace v. Hoare*, Barnes,

231; *Davis v. Skellins*, Id. 232; *Denny v. Trapnell*, 2 Wils. 576.

(c) See *Ann.* 12 Mod. 610.

(d) 1 Scillon, 314.

(e) See the forms, Chit. Forms, 416, 417.

writ of inquiry as in ordinary cases, annex the rule to it, and leave it at the sheriff's office. You then enter the cause with the marshal, in the same manner as if it were a record, and pay him the same fees. See Vol. 1, p. 265. The sheriff afterwards returns the inquisition as in other cases.

If the inquiry is to be before a Judge of assize, the application may be made either to the Court in term time, or to a Judge in vacation: if to the Court, it is made in the manner above directed; if to a Judge in vacation, get a motion paper signed by counsel, and take it, together with the affidavit above mentioned, to the Judge's chambers, and the Judge will grant his fiat to the clerk of the rules to draw up the rule (f). Take the motion paper and fiat to the clerk of the rules, and draw up the rule, and proceed as is above directed.

[Judge's order for a good jury.] When the writ of inquiry is to be executed before the Chief Justice, or a Judge of assize, it is not unusual to obtain a Judge's order (*R. H. 2 W. 4, r. 101*) (g), for the sheriff to return a "good jury," which is a better sort of common jury. The costs of this good jury are now usually allowed to the plaintiff (h).

[Notice of executing the inquiry.] The plaintiff must give a written notice of executing the writ of inquiry, to the defendant himself, if he have no attorney in the cause, or otherwise, to the defendant's attorney. (*Vol. 1, p. 225*) (i). But if the attorney be not known, it may be given to the defendant himself (j). In country cases it must be given to the agent in town, and not to the attorney in the country. (*R. H. 2 W. 4, r. 57*) (k). It must be given to all the defendants, if there be more than one (l), or left at their last or most usual places of abode. (*See R. T. 1 G. 2. See Vol. 1, p. 225*).

If the writ is to be executed in London or Middlesex, and the defendant lives within 40 computed miles of London, eight days' notice must be given, which must be computed exclusive of the day of giving the notice, and inclusive of the day of executing the inquiry. (*R. M. 4 A. c. R. H. 2 W. 4, r. viii.*). But fourteen days' notice is required if the defendant resides at a greater distance, the same as notice of trial; (*see Vol. 1, p. 223*). If the writ is to be executed in any other county, eight days' notice is sufficient. (*R. M. 4 A. c.*). In *replevin* there should be 15 days' notice of inquiry, under the 17 C. 2, c. 7, s. 2 (m). Sunday, Christmas Day, Good Friday, or

(f) See the form, Chit. Forms, 417.  
(g) Formerly a rule was necessary, but by this rule of H. T. a Judge's order is to be obtained in its stead. See the form, Chit. Forms, 417.

(h) *Wilkinson v. Mallin*, 1 Dowl. P. C. 630, 1 C. & M. 230, S. C. Before the rule of H. T. 2 W. 4, r. 10, it was otherwise; see *Calvert v. Gordon*, 3 M. & Ry. 124, 128.

(i) *Mosley v. Sunford*, Barnes, 311, Pr. Reg. 276; *Harding v. Stafford*, Say. 133; *Knibbs v. Hopercraft*, 10 Price, 147; *Brooks v. Till*, 2 Y. & J. 276. See the forms, Chit. Forms, 417, 418.

(j) Id.

(k) See *Hodges v. Perkins*, 3 East, 568.

(l) Pr. Reg. 443.

(m) *Burton v. Hickey*, 6 Taunt. 57, 1 Marsh. 444, S. C.

a day appointed for a public fast or thanksgiving is reckoned, as one of the days, unless it be the last day (*R. M. 4 A.; c. B. H. 2 W. 4, r. viii. Vol. 1, 56*). A defendant, residing at an hotel in London, from the time of his arrest till he was served with notice of inquiry, was holden not entitled to more than eight days' notice in a town cause, though his general residence was above 40 computed miles from London (*n*). Also, where the defendant resides within 40 miles of London before and at the commencement of the action, eight days' notice of executing the writ of inquiry is sufficient, though the defendant has, in the intermediate time, removed permanently to a distance of above 40 miles from London, provided he has not given the plaintiff notice of his removal, in which case he would be entitled to 14 days' notice (*o*). If he reside above 40 miles from London he will be entitled to 14 days' notice, although he may be in London when the notice is served (*p*). Where a defendant is master of a vessel, and resides on board, and has no home on shore, he is considered to reside where his ship is registered; and if more than 40 miles from London, is entitled to 14 days' notice of executing a writ of inquiry (*q*). If the defendant be under terms to take "short notice" of inquiry, this is the same as short notice of trial, namely, four days in country causes, and two days in town causes. (*See Vol. 1, p. 224*) (*r*). A term's notice of inquiry is also necessary, in cases where a term's notice of trial would be required if the cause had proceeded to trial (*s*): in which case, if the notice be given any day before the first day of the term, it will suffice. (*R. H. 2 W. 4, r. 52*). And, in general, the same rules that are applicable to notices of trial, are equally applicable to notices of inquiry. (*MS. H. 1820*).

When the paper book has been delivered to the defendant, with notice of trial indorsed on it, and the defendant strikes out the *similiter* and demurs, (*see Vol. 1, p. 221*), he shall be obliged to accept of notice of executing a writ of inquiry from the time of notice of trial given on the paper book. (*R. H. 8 G. 1*).

And by the late rule of *H. T. 2 W. 4, r. 59*, we have seen (*ante, Vol. 1, p. 225*) that, in all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney may give notice of trial at the time of delivering his replication or other subsequent pleading; and in case issue be afterwards joined, such notice will be available; but if issue be not joined on such replication, or other subsequent pleading, and the plaintiff sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice will operate from the time that notice of trial was so given; and in all cases where the defendant demurs, the defendant's attorney, or defendant,

(*n*) *Lloyd v. Hooper*, 7 East, 624.  
(*o*) *Rochfort v. Robertson*, 12 East, 427; *Spencer v. Hall*, 1 East, 688; *Brind v. Torris*, 2 W. Bl. 1205.

(*p*) *Blaue v. Chaters*, 6 Taunt. 445, 2 Marsh. 151, S. C.

(*q*) *See Blaue v. Chaters*, 6 Taunt. 458; 2 Marsh. 151, S. C.; and Vol. 1,

223

(*r*) *Blaue v. Chaters*, 6 Taunt. 458, 2 Marsh. 151, S. C.

(*s*) *Peyton v. Burdus*, 2 Str. 1100. *See Smith v. Paull*, 3 Smith, 101; and see Vol. 1, 227. See the form, *Chil. Forms*, 132.



if he plead in person, will be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, will be obliged to accept notice of executing a writ of inquiry on the back of such demurrer.

When the writ is to be executed before the sheriff, the notice states that it will be executed on a day therein stated, which must be on or before the return day of the writ (*t*), not being Sunday (*u*), usually between two certain hours (*x*), as between the hours of 10 and 12 o'clock in the forenoon, or between the hours of 4 and 6 o'clock in the afternoon (*y*), "at the secondary's office, No. 28, Coleman Street, London," if in London; or "at the sheriff's office in Red Lion Square, near Holborn, in the county of Middlesex," if in Middlesex; or, if in any other county, then at some place within the county appointed for that purpose, and particularly described in the notice (*z*). A notice of executing the writ "by 10 o'clock" (*a*), or "at 10 o'clock, or as soon after as the sheriff can attend" (*b*), will be bad for uncertainty; so, "between the hours of 10 and 2 o'clock," has been holden insufficient, as not being sufficiently definite (*c*). But a notice to execute "at 11 o'clock," is good, it having been executed before 12 (*d*). When the notice was given for Wednesday, the 11th June, when Wednesday fell on the 10th, on which day the inquiry was executed, the Court refused to set it aside, the defendant refusing to swear that he was misled by it (*e*). If the defendant do not attend punctually at the time mentioned in the notice, and the writ be executed in his absence, the Court will not relieve him (*f*); and on the other hand, if the defendant attend at the hour, he will not be warranted in leaving the Court at the expiration of the time mentioned in the notice; for the sheriff may have prior business, which may detain him beyond that time (*g*). But if the plaintiff, in the absence of the defendant, have the writ executed at a different time or place from that specified in the notice, it will be irregular, and the Court, upon application, will set it aside.

If the writ is to be executed before the Chief Justice or Judge of assize, the notice is given for the sittings or assizes generally (*h*), in the same manner as in the notice of trial, *ante*, Vol. 1, p. 225.

Notice of inquiry may be continued or countermanded, in the same manner as a notice of trial, and as to which see Vol. 1, 226, 227 (*i*). It

(*t*) *Davies v. Salter*, 2 Salk. 627; *Dyke v. Blakston*, 2 Ld. Raym. 1449.

(*u*) *Hoyle v. Cornwallis*, 1 Str. 387

(*x*) Say, 181.

(*y*) Tidd, 579.

(*z*) See Comyns, 551; *Squire v. Almond*, Barnes, 297; *Le Mark v. Newnham*, Id. 300, Say, 131, Pr. Reg. 447.

(*a*) *Isen v. Fowen*, 2 Str. 1142.

(*b*) *Hannaford v. Holman*, Barnes, 295.

(*c*) *Foster v. Snoddes*, Barnes, 295, 296; *Robinson v. Phillips*, Id. 296, Comyns, 551; and see 1 Barnard. 139; *Langstaffe*

*v. Lamb*, Barnes, 293.

(*d*) *Last v. Denny*, Barnes, 302.

(*e*) *Eldon v. Haig*, 1 Chit. Rep. 11; and see *Batten v. Harrison*, 3 B. & P. 1; *sed vide Abraham v. Noakes*, 1 Chit. Rep. 615.

(*f*) 1 Barnard, 233.

(*g*) *Williams v. Frith*, 1 Doug. 193, Loft, 193, S. C. 2 Barnard. 214.

(*h*) Tidd, 579; 1 Sellon, 353.

(*i*) See form of a notice of continuance, Chit. Forms, 418; of countermand, Id. 419.

can be continued but once (*k*). The notice of continuance need not specify the place or hour, for it shall be taken to refer to the place and hour specified in the original notice (*l*).

If the plaintiff do not proceed to execute his writ according to the notice, or countermand it in time, the defendant will be entitled to his costs of the day, on an affidavit of attendance and necessary expenses incurred (*m*), (*R. H. 8-G. 1 a*), in the same manner as for not proceeding to trial. (*See post, Book 4, Part 1, Chap. 24*).

An irregularity in the notice of inquiry, or in the time and place of executing it, is waived in general by the defendant or his attorney attending at the inquiry, and making a defence on the execution of the writ. (*See Vol. 1, 226; ante, 505*).

*Attending by counsel.*] If you wish to attend the execution of the writ of inquiry by counsel, you should give notice thereof to the opposite party (*n*), in order to get the expense of his attendance and briefs, &c., allowed you. Moreover, the sheriff may, it seems, at the request of the opposite party, postpone the execution of the writ, unless such notice be given (*o*). A written notice is not requisite (*p*). The master may or may not in his discretion allow costs for the attendance of counsel, and preparing briefs, &c. (*q*).

*Subpœnaing witnesses.*] After giving the notice of inquiry, the next step to be taken is to subpœna the witnesses necessary to prove the amount of the damages. (*See Vol. 1, 228, 245*) (*r*).

*How writ executed.*] Immediately upon the receipt of the writ, the sheriff will summon a jury. Attend, at the time appointed, with your counsel and witnesses; and the inquest will be taken in nearly the same manner as at a trial at *Nisi Prius*, (*see Vol. 1, 271*), excepting that the jurors cannot be challenged (*s*). Also, the execution of the writ may be adjourned by the sheriff, if necessary, after it is entered upon (*t*).

All the plaintiff has to prove, or the defendant is permitted to controvert, is the amount of the damages (*u*); for the cause of action itself, as stated in the declaration, is impliedly admitted by the defendant, by his suffering judgment to pass against him by default (*x*). In an action on a policy on a foreign ship, when there is a stipulation that the policy shall be sufficient proof of interest, and judgment is suffered by default, the plaintiff, on the inquiry, need only prove the

(*k*) MS. H. 1820. *Price v. Bambridge*, Barnes, 207; *Burgess v. Royle*, 2 Chit. Rep. 220.

(*l*) *Jones v. Chune*, 1 B. & P. 363.

(*m*) *See Sutton v. Bryam*, 2 Str. 728.

(*n*) *See the form*, Chit. Forms, 419.

(*o*) *See Elliot v. Micklin*, 5 Price, 641, 1 Sell. 554; *Coleman v. Mauby*, 2 Str. 853; *Markham v. Middleton*, Id. 1259.

(*p*) *Elliot v. Micklin*, 5 Price, 641.

(*q*) *Ullock v. Hemsworth*, Tidd, 9th

VOL. 11.

ed. 580.

(*r*) *See form of a præcipe for a subpœna*, Chit. Forms, 419; of the *subpœna*, Id.; of the *subpœna ticket*, Id. 420.

(*s*) *Anon.* 3 Salk. 81.

(*t*) *Coleman v. Mauby*, 2 Str. 853, *Markham v. Middleton*, Id. 1259.

(*u*) *De Gaillon v. L'Aigle*, 1 B. & P. 368.

(*x*) *Endem v. Lutman*, 1 Str. 612; and *see 2 Saund. 107, (n. 2)*.

defendant's subscription to the policy, without giving any evidence as to interest (y). A lease, mentioned in the condition of a bond set out by the defendant upon *oyer*, need not be proved (z). So, a bill of exchange, or promissory note, if declared upon, need not be proved, although it must be produced, in order to satisfy the inquest that no money has been paid on account of it (a). So the defendant, in an action on a contract, will not be allowed to give evidence of fraud (b), or of any other matter which would render the contract void; for, by allowing judgment to go by default, he has admitted the validity of the contract. So the defendant will not be allowed to give in evidence, in mitigation of damages, any matter which might have been made the subject of a set off (c). In an action for use and occupation, the plaintiff need not shew that the house occupied by the defendant was the plaintiff's house, as the judgment by default is an admission that the defendant occupied a house under the plaintiff; but if the defendant insist that he did not occupy the particular house alluded to in the evidence produced on the inquiry, the plaintiff must then prove the fact of its being his own house (d). In debt on a bond within the 8 & 9 W. 3, c. 11, where breaches are assigned in the declaration or replication, the averments therein are admitted by the judgment by default, and need not be proved on the inquiry; but they are not so when the breaches are suggested after the judgment, in making up the record (e).

In trespass, or any other action, where the damage actually sustained by the plaintiff is the measure of the damages to be given by the jury, if the plaintiff do not prove the nature of the injury, and the amount of the damage sustained by him, the jury always give nominal damages merely. But where the jury are to imply the amount of the damages from the nature of the injury, and where no special damage could be proved, unless laid in the declaration, as for instance, in an action of slander, or the like, there, although the plaintiff do not offer evidence, yet the jury are not bound to give nominal damages, but may give such damages as the circumstances of the case warrant (g).

If there be two or more defendants who suffer judgment to go by default, the inquest cannot, even in trespass, sever the damages (h); but where there is judgment by default against one defendant, and judgment upon demurrer against the other, the inquest may sever the damages, because the defendants have severed in their pleading (i).

*How returned, &c.*] Within four days after the return day of the

(y) *Thellusson v. Fletcher*, 1 Doug. 5; 1 Esp. 73, S. C.

(z) *Collins v. Rybot*, 1 Esp. 157.

(a) *Green v. Hearne*, 3 T. R. 301; non. 3 Wils. 155; and see *Bevis v. Lindsell*, 2 Str. 1149.

(b) *Exdem v. Lutman*, 1 Str. 612.

(c) *Caruthers v. Graham*, 14 East, 78.

(d) *Davis v. Holdship*, 1 Chit. Rep.

614, n. (a).

(e) *Barwise v. Russell*, 3 C. & P. 608, post, 525.

(g) *Tripp v. Thomas*, 3 B. & C. 427, 5 D. & R. 276, S. C.

(h) *Onslow v. Orchard*, 1 Str. 422, ante, 504.

(i) *Chapman v. House*, 2 Str. 1140. See Vol. I, p. 309.

writ of inquiry, the defendant may if he chooses move the Court to set aside the inquisition, or arrest the judgment, or apply to a judge (k) to stay the judgment until a day named by him. The sheriff or other officer before whom the writ was executed, may also prevent the signing of judgment immediately, if he certify, on the return of the writ (l), that judgment ought not to be signed till defendant shall have had an opportunity of applying to the Court to get the execution of the writ set aside. (1 W. 4, sess. 2, c. 7, s. 1; ante, 508). *Call at the sheriff's office at or after the expiration of these four days, and he will deliver to you the writ and his return with the inquisition.* Such return is indorsed on the writ of inquiry. The inquisition is engrossed on parchment, and signed and sealed in the name of the sheriff and by the jurors (m). To procure such certificate of the sheriff or order of a judge, it is not unusual to make an affidavit of the facts to induce him to grant it, though this seems unnecessary (n). The defendant is entitled to have the inquisition filed, and if the plaintiff's attorney refuse to file it or shew it to the defendant's attorney, the Court will compel him to do so, and to pay the costs (o).

As to the causes for which the Court will set aside the inquisition, see post, Book 4, Part 1, Chap. 27, *New Trial*.

*Final judgment, &c.*] After the four days from the return day of the inquiry has expired, if the sheriff has not certified on the writ as above mentioned, and a judge has not ordered the staying the judgment till a day not yet arrived, and the defendant have not moved to set aside the inquisition or in arrest of judgment, or if he have moved, and the inquisition be not set aside, nor the judgment arrested, *get your costs taxed by the master, and final judgment signed, as upon a postea (see Vol. 1, p. 318), and you may then proceed forthwith to sue out execution.* A rule for judgment is no longer requisite. *R. H. 2 W. 4, r. 86.*

The entry of the judgment is thus:—After the award of the writ of inquiry on the roll, as ante, 512, follows an entry of the return of it and the finding of the inquest, and lastly the entry of the final judgment as in ordinary cases (p). We have seen, ante, 505, that there is no occasion to enter any continuance after a judgment by default. If the roll have already been carried in, this entry will be made by the clerk of the treasury, upon your leaving the inquisition with him for that purpose; *pay him 1s. 6d.* But if the roll have not as yet been carried in, *you must get a roll, as directed Vol. 1, p. 222, and enter the proceedings on it, to the interlocutory judgment inclusive; after which, enter the award of the inquiry, the return, and final*

(k) See a form of the summons and order, Chit. Forms, 421.

(l) See a form of certificate, Chit. Forms, 421.

(m) See a form of the sheriff's return and inquisition, Chit. Forms, 428.

(n) See a form, Chit. Sum. Prac. 358.

(o) *Townsend v. Burns*, 1 Dowl. P. C. 629, 1 C. & M. 176, S. C.

(p) See the form, Chit. Forms, 402; 10 Went. 430, 448, 442, 435, 456.

judgment, as above mentioned. Then docket your entry and carry in the roll, as directed Vol. 1, p. 223 (q).

If the defendant die, after interlocutory and before final judgment, and the interlocutory judgment be revived against the executor, &c. and a writ of inquiry executed; the final judgment in that case must be against the executor or administrator, and not against the testator or intestate (r).

The execution after a writ of inquiry is the same as in ordinary cases.

## SECT. 2.

### Reference to the Master.

As to the cases in which a reference to the master may be substituted for a writ of inquiry, see *ante*, 509. The mode of proceeding is thus:—

In term time make an affidavit of the cause of action, and that interlocutory judgment has been signed (s). Annex this affidavit to a motion paper, and give it to counsel to move to have the matter referred to the master; and the Court will thereupon grant a rule nisi (t). In the case of bills of exchange and promissory notes, this is a motion of course. It may be made on the same day the interlocutory judgment is signed, for want of a plea, or for not producing the record on *nul tiel record* pleaded (u); or at any time afterwards. Where, however, such judgment is signed upon demurrer, the practice is not to move for a rule absolute till the following day (x). The rule can, it seems, in no case be obtained, till judgment has been, in fact, signed, whether for want of a plea or on demurrer, or for not producing an alleged record (y). Draw up the rule with the clerk of the rules, and serve a copy of it on the defendant's attorney; or on the defendant, if he have not appeared. If there be several defendants, the service of the copy of the rule must be on each (z). The original rule need not be shewn unless sight thereof be demanded (a). It may be as well to observe, that no irregularity previous to the judgment can be shewn as cause against the rule; but a cross rule must be obtained to set aside the judgment; and pending which rule, the Court will enlarge the rule to refer (b). If no cause be shewn, get counsel to move to make the rule absolute, upon an affidavit of service (c).

(q) See Chit. Forms, 421, 412.

(r) 2 Saund. 72 n.

(s) See the form, Chit. Forms, 422.

(t) Id.

(u) *Pocock v. Carpenter*, 3 M. & Sel. 109; *Haywood v. Chambers*, 5 B. & Ald. 752, 1 D. & R. 411, S. C.; *Russen v. Hayward*, 1 D. & R. 444, 5 B. & Ald. 752, S. C. See *Gordon v. Corbett*, 3 Smith, 179.

(x) Id.

(y) *Moses v. Compton*, 6 M. & Sel. 381.

(z) *Flindt v. Biguell*, 1 Chit. Rep. 466, n.

(a) R. II. 2 W. 4, r. 51. See *Belairs v. Poultney*, 1 Chit. Rep. 466, n.

(b) *Pell v. Brown*, 1 B. & P. 369; *Maryat v. Winkfield*, 2 Chit. Rep. 119.

(c) See Chit. Forms, 423.

*Draw up the rule with the clerk of the rules; serve a copy of it on the defendant's attorney; or on the defendant, if he have not appeared (d). Serve also on him a notice of the intended taxation of costs, one day or more before the taxation, as in other cases, see ante, Vol. 1, 319. Then take the rule absolute to the master, who will thereupon compute the sum due to the plaintiff, for principal and interest, tax the costs, and sign judgment as usual, and as mentioned Vol. 1, 318. You may then sue out execution as usual (e). In the Court of Common Pleas, it is necessary for the plaintiff to give notice to the defendant, of the time appointed by the prothonotary for computing the principal and interest, in analogy to the practice upon writs of inquiry (f). But no such notice is requisite in this Court (g).*

In vacation, the rule may be obtained by application to a judge in chambers. For this purpose, *make an affidavit of the cause of action, and that interlocutory judgment has been signed. Take out a summons for the defendant, to shew cause why it should not be referred to the master to compute principal and interest, &c. Serve a copy on the defendant's attorney; or on the defendant, if he have not appeared; and if no cause be shewn, the judge, upon your producing the affidavit above mentioned, will grant his fiat to the clerk of the rules to make out the rule (h). Get a motion paper, signed by counsel, and take it, together with the order, to the clerk of the rules; draw up the rule, and proceed as is above directed.*

Where it appeared, upon affidavit, that the bill had been stolen out of the attorney's pocket, the Court ordered the usual reference to the master, upon production of a copy (i). Where interlocutory judgment was signed, and the plaintiff died on a subsequent day in the term, the Court granted a rule to compute principal and interest on the bill on which the action was brought (k). Upon demurrer to one count, (on a bill of exchange), and judgment for the plaintiff; and a plea to the other counts, upon which issue was joined; the Court granted a reference to the master, to see what was due to the plaintiff on the former (l).

If your roll have been already carried in, the clerk of the treasury will enter the judgment, upon your leaving the rule, above mentioned, with him for that purpose. Otherwise, *you must get a roll, as directed, Vol. 1, 222, and enter the proceedings upon it (m); then docket, and carry in your roll, as directed, Vol. 1, 223 (n).* The declaration usually contains other counts, besides the count or counts upon the bill of exchange, &c.; and, as damages are assessed upon the counts on the bill of exchange, &c. alone, a *nolle prosequi*, as to

(d) *Bank of England v. Atkins*, 1 Chit. 466; *Dawson v. Sladford*, Id.

(e) See Chit. Forms, 254 to 308.

(f) *Branning v. Patterson*, 4 Taunt. 487.

(g) *MS. K. B.; Huckfield v. Kendall*, 1 Chit. Rep. 693.

(h) See the forms, Chit. Forms, 422, 423.

(i) *Brown v. Messiter*, 3 M. & Sel. 281; and see *Allen v. Messiter*, 1 Dowl. P. C. 420.

(k) *Berger v. Green*, 1 M. & Sel. 229; and see ante, 490.

(l) *Duperuy v. Johnson*, 7 T. R. 473.

(m) See form of the entry, Chit. Forms, 424.

(n) See Chit. Forms, 424, 412.

the other counts, must be entered on the roll, in entering the judgment (o). Where the roll contained an award of a writ of inquiry, and afterwards an assessment of damages by the Court, upon a writ of error being brought for this cause, it was urged, on the authority of *Blackmore v. Flemyng*, (p), that, by the award of the writ of inquiry, the plaintiff had made his election to have his damages ascertained by a jury, and could not afterwards retract, and have his damages assessed by the Court; the Court, however, affirmed the judgment (q).

## SECT. 3.

*Writ of Inquiry in Debt on Bond.*

*In what cases necessary.*] “In all actions in any Court of record upon any bond, or on any penal sum, for non-performance of any covenants or agreements contained in any indenture, deed, or writing,”—(whether the covenant, &c. be contained in the same, or in any other deed or writing (r); and the statute extends to bonds, &c. for the payment of money by instalments (s), for the payment of an annuity (t), for the performance of an award (u), or for the performance of any other specific act, excepting for the payment of a sum of money in gross, at a certain time, as *post obit* bonds (x), and excepting other bonds for the payment of money, which are provided for by the 9 A. c. 16, s. 13 (y), and excepting the case of a bail bond (z), a replevin bond (a), the bond of a petitioning creditor (b), and a bond for replacing stock (c), or indeed any bond, where the damages to be assessed by the jury, would be calculated to meet and satisfy the entire condition of the bond (d),) “the plaintiff may assign as many breaches as he shall think fit, and the jury shall assess not only such damages and costs as have heretofore been usually done, but also damages for such of the breaches of covenants, &c. as the plaintiff upon the trial of the issues shall prove to have been broken; and the like judgment shall be entered on such verdict as heretofore has been usually done. And if judgment shall be given for the plaintiff on demurrer, or by confession, or *nil dicit*, he may suggest upon the roll as many breaches as he shall think fit; up-

(o) See Chit. Forms, 424; *Fleming v. Langton*, 1 Str. 532; *Duperoy v. Johnson*, 7 T. R. 473; ante, 481.

(p) 7 T. R. 446.

(q) *Gould v. Hammersley*, 4 Taunt. 148.

(r) 2 Bur. 824, 826; *Hurst v. Jennings*, 5 B. & Cres. 650, 8 D. & R. 424, S. C.

(s) *Willoughby v. Swinton*, 6 East, 550, 2 Smith, 636, S. C. See 2 W. Bl. 706, 958; *Van Sandan v. —*, 1 B. & Ald. 214.

(t) *Walcot v. Goulding*, 8 T. R. 126.

(u) *Welch v. Ireland*, 6 East, 613,

2 Smith, 666, S. C.; *Hanbury v. Guest*, 14 East, 401.

(x) 2 Camp. 285, n.; *Murray v. Earl of Stair*, 2 B. & Cres. 82, 89, 3 D. & R. 78, S. C.

(y) *Cardozo v. Hardy*, 2 Moore, 220.

(z) *Moody v. Pheasant*, 2 B. & P. 446.

(a) 2 Saund. 187, (n. 2); *Middleton v. Bryan*, 3 M. & Sel. 155.

(b) *Smith v. Broomhead*, 7 T. R. 300;

*Smith v. Edmonson*, 3 East, 22.

(c) *Savile v. Jackson*, 13 Price, 715.

(d) See *Smith v. Bond*, 10 Bing. 125.

on which a writ shall issue to the sheriff of the county where the action is brought, to summon a jury before the justices of assize (*see infra*) of that county, to inquire of the truth of those breaches, and to assess the damages; in which writ the said justices of assize shall be commanded to make return thereof to the Court from whence the same shall issue, at the time mentioned in such writ. And in case the defendant, after such judgment, and before execution, shall *pay into Court* to the use of the plaintiff, the damages assessed and costs, a *stay of execution* shall be entered on the record; or, if by reason of an *execution*, the plaintiff shall be fully paid all the damages and costs, and the charges of the execution, the defendant's body, land, or goods, shall be thereupon forthwith discharged from the execution, which shall likewise be entered upon the record. But in each case the judgment shall, notwithstanding, remain as a *further security* to answer to the plaintiff such damages as he may sustain by any *further breach* of a covenant contained in the same indenture, deed, or writing; upon which the plaintiff may have a *scire facias* upon the said judgment, against the defendant, his heirs, terretenants, or executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively, to shew cause why execution should not be awarded upon the same judgment, in which there shall be the same proceeding as there was in the action of debt upon the said bond, for assessing of damages upon the trial of issues joined upon such breaches, or inquiring thereof upon a writ to be awarded in manner aforesaid; and upon payment or satisfaction as aforesaid of such future damages, costs, and charges as aforesaid, all further proceedings on the judgment aforesaid are again to be stayed, and so *toties quoties*, and the defendant's body, land, or goods, shall be discharged out of execution, as aforesaid." (8 & 9 W. 3, c. 11, s. 8). This enactment, however, so far as it requires the writ of inquiry to be executed before the Justices of Assize or *Nisi Prius*, is materially altered by the recent act 3 & 4 W. 4, c. 42, s. 16, which, to prevent delay, enacts, that the writ shall (*unless the Court where such action is pending, or a Judge, otherwise orders*) direct the sheriff of the county where the action is brought to summon a jury to appear before such *sheriff*, instead of the justices, to inquire of the truth of the breaches suggested, and assess the damages, and shall command the sheriff to make return thereof to the Court from whence the same shall issue at a day certain, in *term* or in *vacation*, in such writ to be mentioned, and such proceedings shall be had after the return of such writ as are in that behalf mentioned in 8 & 9 W. 3, c. 11, in like manner as if such writ had been executed before a Justice of Assize or *Nisi Prius*.

The defendant is accountable only to the extent of the *penalty*; and as soon as that is recovered, or if the defendant choose to pay it into Court, the plaintiff can proceed no further, but, on the contrary, may be compelled to enter satisfaction on the record (e).

(e) 1 Saund. 58 a, (n. 1); *Brangwin v. son*, 6 T. R. 303. See *Lonsdale v. Perrot*, 2 W. Bl. 1190; *Wilde v. Clark- Church*, 2 T. R. 388.



This statute of 8 & 9 W. 3 was made in favour of defendants, and receives a liberal construction (f). It has been ruled, that the statute is obligatory; and although it enacts, that the plaintiff "may" assign, "may" suggest, &c., yet the word "may" is compulsory, and the plaintiff *must* assign or suggest the breaches, otherwise the proceedings will be erroneous (g). The statute is confined only to actions of *debt* (h). It does not apply to a judgment entered up on a warrant of attorney, to confess a judgment on a *mutuatus*, and this, though a bond be also given (*ante*, 502). It does not extend to cases at the suit of the crown (i).

*Proceedings after judgment by default.*] If the writ of inquiry is to be executed before the sheriff, *enter the proceedings on the roll, as in the case of a judgment by default in debt, omitting these words in the judgment, "By the Court of our said lord the king now here adjudged and with his assent; and the defendant in mercy, &c." Then, in a new paragraph, suggest the breaches for which you seek damages; and in the same paragraph enter an award of a writ of inquiry (j). This suggestion of breaches, however, would be unnecessary if the breaches have been already assigned in the declaration. Make a copy of the breaches, when thus suggested, and serve it on the defendant or his attorney or agent, if he has employed one in the action. Serve also the notice of inquiry, as *ante*, 514 (k). Then sue out the writ of inquiry (l), as directed, *ante*, 513, to be executed before the sheriff; deliver it to the sheriff, who will thereupon summon the jury, and the writ will be executed before the sheriff or his deputy. The same practice as to attending by counsel, subpoenaing witnesses, and the mode of executing the writ of inquiry in ordinary cases, as noticed *ante*, 517 to 519, will apply to this case.*

If you are desirous that the writ shall be executed before the Chief Justice at the sittings, if the venue is laid in Middlesex or London, or before a Judge of assize, if the venue is laid in any other county, it is necessary that you should obtain leave of the court or a judge for that purpose. (3 & 4 W. 4, c. 42, s. 16). It is only, however, where some difficult or important question of law or fact is likely to arise in the course of the inquiry that the court or a judge will grant this indulgence; and the mere difficulty or importance of the facts will not, it seems, induce the court or a judge to grant it when the venue is laid in Middlesex or London (m), for the under-sheriff of Middlesex, and the secondary in London, are generally men of experience, and fully competent to conduct a business of this kind. *The application to the court or a judge should be made as directed ante*, 513 and 514. *Having obtained and drawn up the rule, as there directed, enter the proceed-*

(f) *Hardy v. Bern*, 5 T. R. 637.

(g) *Hardy v. Bern*, 5 T. R. 636; *Roles v. Rosewell*, Id. 538, 540; *Drage v. Brand*, 2 Wils. 377; *Goodwin v. Crowle*, 1 Cowp. 359.

(h) 1 Saund. 58 b, (n.), 5th ed.

(i) *Rex v. Peto*, 1 Y. & J. 171.

(j) See the form, Chit. Forms, 425, 426; 2 Saund. 187 b, (n. e), 1 Saund. 58 d.

(k) See Chit. Forms, 430.

(l) See the form, Chit. Forms, 427, 428.

(m) See 1 Sellon, 344.

ings on the roll, with the suggestion of the breaches, and make and serve a copy of such breaches, and the notice of the inquiry, as directed *supra*. Then sue out a writ of inquiry, as directed *ante*, 513, to be executed before the Chief Justice at the sittings, or the Judges of assize at the assizes, according to the county in which the venue was laid (n); deliver it, with the rule, to the sheriff, who will thereupon summon a jury, will annex the panel to the writ, and deliver the writ and panel to the associate. And lastly, you must make out a copy of the record on plain paper or parchment, for the Chief Justice or Judges of assize, and leave it with the marshal when you enter the cause. If you desire to have a better sort of common jury, see *ante*, 514. When the cause is called on, the inquest is taken precisely in the same manner as a cause is tried at *Nisi Prius*.

As to the evidence on executing a writ of inquiry in general, see *ante*, 517. The plaintiff need not prove the breaches if they have been assigned, or any averments contained in the declaration. But he must prove all averments and breaches (if any) that have been suggested in the record after judgment (o). In a late case, in an action on a bond, against a surety, it was held that if non-payment by the principal, after notice in writing required by the condition, be averred in the declaration, and the defendant suffer judgment by default, it is not necessary to give evidence of the notice, because the allegations of the declaration are not put in issue; though, if the breach be suggested in the record under the statute after judgment, it would be otherwise (p). So, on the execution of the writ of inquiry after judgment on demurrer, the execution of an instrument, which the defendant has stated in setting out the condition of the bond in his plea, need not be proved (q). Where, in debt on bond conditioned for the performance of covenants in an indenture, &c., or of an award, judgment is suffered to pass by default, and breaches are suggested, the plaintiff must prove the condition of the bond, the award, indenture, &c., as well as the breaches (r).

If the inquiry was executed before the sheriff, the inquisition and return will be framed (s), and procured as directed, *ante*, 519. If it was executed before the Chief Justice or Justices of assize, the associate will prepare the inquisition (t), and have it sealed with the seal of the Chief Justice or Justices of assize, and annex it to the writ of inquiry. You may then proceed to tax your costs, and sign judgment as directed *ante*, Vol. 1, 318.

The remaining proceedings are entered upon the roll, thus:—after the award of the writ of inquiry, make an entry of the return of it and of the inquisition; then follows the judgment for the debt, damages, and costs, as in the usual form in debt; then an award of a writ of execution against the defendant's goods, lands, or person;

(n) See the forms, Chit. Forms, 430; and see *ante*, 513.

(o) See 1 Saund. 58 a, 5th ed.

(p) *Barwick v. Russell*, 3 C. & P. 608.

(q) *Collins v. Rybot*, 1 Esp. Rep. 157.

(r) 1 Saund. 58 d. See *Bartlett v. Pentland*, 1 B. & Adol. 704.

(s) See the form, Chit. Forms, 431.

(t) See the form of the inquisition and return, Chit. Forms, 431.

and, lastly, if the writ be executed, follows the entry of the sheriff's return to the writ of execution, and of an acknowledgment of satisfaction by the plaintiff as to the amount levied (z). The judgment above mentioned includes the costs of the inquiry, but not the damages given by the inquest (a).

The writ of execution must of course pursue the judgment, and be for the penalty, nominal damages and costs, but it must be indorsed to levy only the damages given by the inquest and costs of increase, together with the reasonable charges and expenses of executing the writ (b).

*Proceedings after judgment on demurrer or nul tiel record.]* The proceedings are the same as when judgment is allowed to pass by default. The judgment for plaintiff upon demurrer, &c., in debt is entered, omitting the latter words of it, in the same manner as in the judgment by default above mentioned; then follows the suggestion of breaches, if the breaches have not already been assigned in some of the previous pleadings. The remainder of the proceedings are the same as above stated.

*Proceedings upon issue joined.]* The best way of declaring on a bond, &c. of the description above mentioned, particularly if you expect to obtain a judgment by default, is, to set forth in the declaration the condition of the bond, and assign the breaches therein. But the usual mode of declaring is, to declare as upon a common money bond (c); the defendant, if he pleads, then usually sets forth the condition upon *oyer*, and pleads *performance*; the plaintiff in his replication states the breaches; and the defendant in his rejoinder takes one issue on each of them. As soon as issue is joined, the paper book, with an award of a *venire*, is made up, delivered, and returned in the usual way; and the issue is tried as in ordinary cases. If the defendant, however, instead of pleading performance, plead any other plea which cannot lead to an issue upon the breaches, but upon which the plaintiff, if he recovers, must have judgment *quod recuperet*, if, for instance, to a declaration as upon a common money bond, he plead *non est factum* (d), or *non est factum* and that the bond was obtained by fraud and covin (e), or the like, the plaintiff, in making up the issue, immediately after entering the pleadings, may suggest the breaches, and then enter the award of the *venire* (f). Or if the issue have been already delivered without the suggestion, then take out a summons before a Judge, for the defendant to shew cause why a suggestion of breaches should not be entered on the record; and upon the Judge's order being obtained for

(z) See the form of the entry, Chit. Forms, 432; 1 Saund. 58 c; 2 Id. 187.

(a) See *Hankin v. Broomhead*, 3 B. & P. 607.

(b) 1 Saund. 58 b, (n. 1). See the form, Chit. Forms, 432.

(c) See, as to the advantages of each

mode of declaring, 2 Chit. Pl. 5th ed. 440 a.

(d) *Ethersey v. Jackson*, 8 T. R. 255.

(e) *Homfray v. Rigby*, 5 M. & Sel. 60.

(f) *Homfray v. Rigby*, 5 M. & Sel. 60; *Ethersey v. Jackson*, 8 T. R. 255.

that purpose, and served in the usual way, then deliver a fresh issue including the suggestion (*g*). As to the *evidence*,<sup>\*</sup> see the observations *ante*, 517. The *verdict* for plaintiff is the same as in ordinary cases; but the jury must also assess damages for the breaches. The judgment for plaintiff is, that he recover the debt, and 1*s.* damages for the detention thereof, together with 40*s.* costs, and the costs of increase, the latter of course including the costs of the trial (*h*). The writ of *execution* must pursue the judgment; but it must be indorsed to levy only the damages found upon the breaches, the costs of increase, and the expenses of the execution, as mentioned, *ante*, 526.

*Scire facias*.] If, after the first inquisition or trial, the defendant be guilty of any further breaches, as the statute says that in such a case the judgment already signed shall remain as a security to the plaintiff, the plaintiff, in order to obtain damages, must sue out a *scire facias* on the judgment, and thereupon suggest the further breaches (*i*); and upon the defendant's pleading thereto, or making default, the plaintiff must proceed in the manner above directed. If the plaintiff obtain a judgment by default, he must issue a writ of inquiry (*k*). The judgment will be the common judgment in *scire facias*, namely, an award of execution. The execution will be for the amount of the debt and costs, as above mentioned, but indorsed to levy the damages, and the costs of the *scire facias*, only. See further as to the *scire facias*, *post*.

(*g*) *Ethersey v. Jackson*, 8 T. R. 255; and see Vol. I, p. 220; *Hanbury v. Guest*, 14 East, 401. See the form of the issue, where the breaches are assigned in the pleadings, Chit. Forms, 122; and of the jury process thereon, Id. 155; of the issue, where the breaches are not assigned in the pleadings, Id. 123; and of the jury process thereon, Id. 153; of

the *postea*, judgment, and execution for plaintiff, Id. 178, 199; and of the entry upon the roll, Id.

(*h*) 1 Saund. 58 b, (n). See the forms, Chit. Forms, 199.

(*i*) See the forms, Chit. Forms, 435.

(*k*) See a form of writ of inquiry, 3 Chit. Pl. 1293.

## BOOK III.



## PART I.

## PROCEEDINGS IN PARTICULAR ACTIONS.

## CHAPTER I.

## EJECTMENT.

- SECT. 1. *Proceedings in Ejectment, in ordinary Cases*, 528 to 556.  
 2. *Proceedings in Ejectment, on a vacant Possession*, 556.  
 3. *Proceedings in Ejectment by Landlord, for non-payment of Rent*, 559 to 563.  
 4. *Proceedings in Ejectment by Landlord under stat. 1 G. 4, c. 87*, 563 to 568.  
 5. *Proceedings in Ejectment by Landlord under stat. 1 W. 4, c. 70, ss. 36, 37*, 568 to 575.  
 6. *Action for mesne Profits*, 571.

## SECT. 1.

*Proceedings in Ejectment, in ordinary Cases.*

AN actual entry upon the premises sought to be recovered (or a claim, when an actual entry is impracticable), or a notice given to the tenant to quit at the end of his year's tenancy, is in some cases necessary, before an action of ejectment is commenced.

An actual entry into lands is only necessary to avoid a fine with proclamations (a), and in the cases of vacant possession mentioned in

(a) *Berrington v. Parkhurst*, 2 Str. Ejectm. 2nd ed. Chap. 6; Rosc. on 1086; *Doe d. Compere v. Hicks*, 7 T. R. Evid. p. 328.  
 433; 1 Saund. 319 b, &c.; Adams on

the next section; in all other cases, the entry's being confessed, according to the terms of the consent rule, is deemed sufficient. This entry must be made within five years after the fine has been levied, and the proclamations completed; provided the party be not an infant, or a married woman, or insane, or beyond sea, at the time; and then within five years after the disability ceases. (4 H. 7, c. 24). In all other cases, an entry must be made within twenty years after the right of entry accrued, unless the party labour under some of the above disabilities. (21 J. 1, c. 16) (b). But an ejectment lies only where the party bringing it has a right of entry; and this statute having taken away his right of entry after twenty years, consequently twenty years is the time limited for bringing an ejectment (c). And by 4 & 5 A. c. 16, s. 16, no entry or claim shall be of force to avoid a fine with proclamations, or be sufficient within the above statute 21 J. 1, c. 16, unless the action be commenced within one year afterwards. These statutes are never specially pleaded in ejectment, but may be given in evidence under the general issue.

A notice to quit is necessary in order to determine a tenancy from year to year. The notice must be to quit at the end of the year of the tenancy, and must be given at least half a year previously: as, if the tenancy commenced on the 25th March, the notice must be to quit on the 25th March, and must be given on or before the 29th September preceding (d).

Wherever a person has a right of entry, he may, if the premises be unoccupied and vacant, in a peaceable manner, and without using such force as would amount to a forcible entry, enter and take possession of them, without bringing an ejectment (e). In general, however, and especially if the right of entry be fairly contested, it is best to proceed by ejectment.

The Court will exercise an equitable jurisdiction over the proceedings in an action of ejectment, which, for the purposes of justice and convenience, may be said to be peculiarly its own creature (f).

*Declaration, notice to appear, and service of.*] Make out a draft of the declaration, and add a notice to appear at the bottom of it (g). It must not recite the original writ, as it formerly used to do, in proceedings by original. (R. H. 2 W. 4, r. iv.) It may be as well observed, that the day of the demise may be laid after the title of the declaration. The omission of (h), or a mistake in, the title of the term is not, in general, material, provided the tenant has sufficient notice given to him to appear (i). If the ejectment be by a landlord,

(b) Arch. Pl. & Ev. 10.

(c) See, upon this subject, Arch. Pl. & Ev. 10, 31, 452, &c.; Rosc. on Evid. 351, 320; 1 Saund. 319 c; Tidd, 9th ed. 1198.

(d) Rosc. on Evid. 333, &c. See Arch. Pl. & Ev. 455 to 458. See the forms, Chit. Forms, 437, 430.

(e) Com. Dig. "Condition," (O), 3; *Tavnton v. Costar*, 7 T. R. 431; *Turner v. Meymott*, 1 Bing. 158, 7 Moore, 574, S. C.; *Butcher v. Butcher*, 7 B. & Cres.

390, 1 M. & R. 220, S. C.; *Doe v. Roby v. Maisny*, 8 B. & Cres. 767.

(f) *Per Bayley, J.*, in *Thrustout v. Shenton*, 10 B. & Cres. 111.

(g) See the forms, Chit. Forms, 439 to 442.

(h) *Adams on Eject.* 2nd ed. 181; Tidd, 9th ed. 1204.

(i) *Goodtitle v. Ranger*, 2 Chit. Rep. 172; *Anon. Id.*; *Anon. Id.* 173; *Doe v. Roe*, MSS., K. B., 6 June, 1833.

where the tenancy has expired, or the right of entry accrued, in or after either of the *issuable* terms, and you purpose proceeding to trial at the next assizes, under the provisions of the 1 W. 4, c. 70, s. 36, (*post*, 568); then, according to those provisions, the declaration should be intitled of the day next after the day of the demise, in such declaration; and this, whether the same be in term or vacation (*h*).

The notice to appear, at the bottom of the declaration, should, it seems, be directed to the tenant by his Christian and surname (*i*). In a late case, however, a rule was refused to set aside the service of a declaration in ejectment, on the ground that the notice was addressed to the tenant by a wrong Christian name (*k*). It is usual, and advisable, to fix the names of all the tenants to such notice; but this is not, it seems, absolutely requisite, and it may be directed to the individual tenant who is served (*l*). If the venue be laid in London or Middlesex (and it must, of course, be laid in the county in which the premises lie, unless otherwise ordered by the Court), the notice should require the tenant's appearance on the first day of the next term (that is, the first day in full term), or within the first four days of the next term (*m*). But, if the venue be laid in any other county, the notice should be for the next term generally; and this, whether such term be issuable or not (*n*). A notice to appear in eight days of St. Hilary, instead of Hilary term generally, was holden void (*o*). But, in another case, where the notice was of a wrong term, the Court permitted it to be amended (*p*). If the ejectment be by a landlord against his tenant, where the tenancy has expired, or the right of entry accrued in or after either of the issuable terms, and you purpose proceeding to trial at the next assizes, under the provisions of the 1 W. 4, c. 70, s. 36 (*post*, 568); then according to those provisions, the notice should require the tenant to appear, and plead within *ten* days. In an ejectment, not against a tenant within these provisions, where the notice required the tenant to appear and plead within *ten* days, the Court refused to set aside a judgment against the casual ejector for irregularity, the declaration and notice having been served before the term (*q*). The omission of the words "wheresoever, &c.," in the notice in an ejectment by original, is not material (*r*).

*After the draft of the declaration has been prepared, engross it on plain paper; make as many copies of it as there are tenants in possession of the premises in dispute, and let a copy be served on each tenant before the first day of the next term.*

(*h*) *Doe v. Roe*, 2 C. & J. 123.

(*i*) *Doe v. Roe*, 1 Chit. Rep. 573 a; *Doe v. Badtittle*, Id. 215 a; Adams on Eject. 2 ed. 202; *Doe v. Roe*, 1 Moore, 113; *Doe d. Atkins v. Roe*, 2 Chit. Rep. 179.

(*k*) *Doe d. Stainton v. Roe*, 6 M. & Sel. 203; and see *Doe d. — v. Roe*, 1 Chit. Rep. 573, where the Christian name was abbreviated.

(*l*) *Doe d. Burlton v. Roe*, 7 T. R. 477; *Doe d. Pearson v. Roe*, 5 Moore, 73.

(*m*) *Holdfast v. Freeman*, 2 Str. 1049.

(*n*) See R. E. 2 G. 4.

(*o*) *Lackland v. Badland*, 8 Moore, 79.

(*p*) *Doe d. Bass v. Roe*, 7 T. R. 469; and see *Anon.* 2 Chit. Rep. 171. The tenant, however, ought, it seems, to be apprised in due time of the mistake.

(*q*) *Anon.* 1 Dowl. P. C. 18. It is not stated in the report of this case where the premises were situate. If not situate in London or Middlesex it would seem the decision would not apply.

(*r*) *Doe d. Thomas v. Roe*, 2 Chit. Rep. 171.

Where different parts of the premises are in possession of different tenants, each of them must be served with a copy of the declaration, in order to obtain a rule for judgment against the casual ejector for the whole (*s*). And in a late case, where premises were let on lease by A. to B., and B. underlet them to several persons,—in ejectment by A., it was held, the declaration should have been served on all the tenants in possession (*t*); otherwise, only such parts of the premises as were occupied by the tenants actually served, could be recovered in the action. But it seems, a service of the declaration on one of two or more *jointenants*, is good service, if the notice to appear be addressed to all the *jointenants* (*u*).

The declaration should, regularly, be served on either the tenant himself, or on his wife (*v*): on the tenant himself, it may be served any where (*w*); on the wife, it may be served either on the premises, or at the husband's house (*x*); or it seems anywhere else, provided she was living with her husband at the time (*y*); but in all other cases, it must be served upon the premises. It is not necessary to the validity of the service, however, that the tenant or his wife receive the copy of the declaration; it is sufficient if it be tendered to him or her; after which it may be left for them at the place where the tender was made (*z*). Service on the churchwardens and overseers, in ejectment for a house rented by the parish for the purpose of harbouring some of the parish poor, has been deemed sufficient (*a*). Service on the book-keeper of a company in possession of part of the premises has been held sufficient (*b*).

If the tenant or his wife be not at home, the declaration may be served on his child or servant, or, as it seems, on any other person on the premises; and if it afterwards appear, from the acknowledgment of the tenant himself (*c*), or of his attorney (*d*), that the tenant received the declaration before the first (*e*) day of the term, the ser-

(*s*) *Doe d. Bromley v. Roe*, 1 Chit. Rep. 141.

(*t*) *Doe d. Lord Darlington v. Cock*, 4 B. & C. 259.

(*u*) *Doe d. Williamson v. Roe*, 10 Moore, 493; and see *Doe d. Bromley v. Roe*, 1 Chit. Rep. 141; *Doe d. Bailey v. Roe*, 1 B. & P. 369.

(*v*) *Goodright v. Thrustout*, 2 W. Bl. 800; *Doe d. Neale v. Roe*, 2 Wils. 263. In *Doe d. Walker v. Roe*, 4 M. & P. 11, the service was on a woman, who represented herself to be the tenant's wife, and it was held sufficient. And see *Doe Simmons v. Roe*, 1 Chit. Rep. 228; *Doe Smith v. Roe*, 1 Dowl. P. C. 614.

(*w*) Tidd, 1210; 2 Sellon, 96.

(*x*) *Doe d. Morland v. Bayliss*, 6 T. R. 765; *Doe d. Baddam v. Roe*, 2 B. & P. 55; and see *Right v. Wrong*, 2 D. & R. 84.

(*y*) *Doe d. Briggs v. Roe*, 2 C. & J. 202, 1 Dowl. P. C. 312, S. C.; *Doe d. Wingfield v. Roe*, 1 Dowl. P. C. 693.

(*z*) *Bagshaw v. Toogood*, Barnes, 185; *Halsey v. Wedgwood*, Id. 174; *Farmer v. Thrustout*, Id. 180; and see *Douglass v. —*, 1 Str. 575; *Sprightly v. Dunch*, 2 Bur. 1116; *Anon.* 2 Chit. Rep. 185.

(*a*) *Tupper v. Doe*, Barnes, 181. See form of affidavit of personal service on tenant, Chit. Forms, 443; of service on wife, Id.

(*b*) *Doe v. Doe*, 1 Dowl. P. C. 23.

(*c*) *Roe d. Hambrook v. Doe*, 14 East, 441.

(*d*) *Doe d. Teverell v. Snee*, 2 D. & R. 5; *Anon.* 2 Chit. Rep. 187; and see *Doe v. Roe*, 2 D. & R. 12.

(*e*) Before the late rule of T. T. 1 W. 4, it was necessary that the acknowledgment should be that he received it before the *essoign* day. See *Doe v. Roe*, 5 B. & Cres. 764; *Doe d. Warren v. Roe*, 8 D. & R. 342; *Roe d. Hambrook v. Doe*, 14 East, 441; *Doe d. Halsey v. Roe*, 1 Chit. Rep. 100.



vice will be deemed sufficient (*f*). But the wife's acknowledgment in such a case will not, in general, be sufficient (*g*). Where the tenant resided abroad, but carried on his business by means of an agent upon the premises, service of the declaration on the agent was holden to be good service (*h*). In another case, however, in the Common Pleas, where the tenant went and resided abroad to avoid his creditors, and the declaration was delivered to a servant on the premises, who was left in charge of them, and another copy affixed to the outer door of the house, this was deemed insufficient (*i*). In such cases, where the declaration is not served personally on the tenant or his wife, the manner in which it was served should be stated to the Court in the affidavit of service when you move for judgment against the casual ejector.

In many cases it happens that service of the declaration and notice, as above directed, is impracticable, either from the tenant's absconding, or from other causes. In such cases, the service should be made in the best manner possible, under the peculiar circumstances of each case. *Then move the Court, upon an affidavit of the facts, for a rule to shew cause why the service in question should not be deemed good service, and that leaving a copy of the rule with some person on the premises, or affixing it upon the outer door, if no person can be met with, shall be deemed good service of the rule (k). Draw it up with the clerk of the rules, and serve a copy of it in the manner directed by the rule: and if no sufficient cause be afterwards shewn, the Court will make the rule absolute upon an affidavit of service (l).* The rule nisi need not be directed to any particular person (*m*). Where the tenant in possession was a lunatic, and the declaration was served on a person who resided with her, and transacted her business, (no committee being appointed), the Court granted a rule to shew cause why this should not be deemed good service (*n*). The service of the declaration on the clerk of a public body, (the clerk having been directed to be appointed by act of parliament), is sufficient, to grant a rule nisi why it should not be good service (*o*). The service of the declaration on a son of the tenant in possession, who said that his father was unable to attend to business, coupled with a subsequent admission by the wife of the tenant that he had received it, has been held sufficient to grant a rule nisi, calling on the tenant to shew cause

(*f*) See *Goodtitle v. Thrustout*, 4 Barnes, 183; *Smith v. Hurst*, 1 H. Bl. 644. See form of affidavit of service in such a case, Chit. Forms, 444.

(*g*) *Goodtitle v. Badtitle*, 1 B. & P. 384; *Doe d. James v. Staunton*, 1 Chit. Rep. 121, 2 B. & Ald. 371, S. C.; *Doe d. Briggs v. Roe*, 1 Dowl. P. C. 312; but see *Doe v. Roe*, 2 D. & R. 12.

(*h*) *Doe v. Roe*, 4 B. & Ald. 653; and see 1 D. & R. 514; *Doe d. Harrison v. Roe*, 10 Price, 30.

(*i*) *Roe d. Fenwick v. Doe*, 3 Moore, 576.

(*k*) See the form of the rule, Chit.

Forms, 446.

(*l*) See form of affidavit, Chit. Forms, 446. See *Douglas v. —*, 1 Str. 575; *Fenn v. Denn*, 2 Bur. 1181; *Methold v. Norright*, 1 W. Bl. 290; *Gulliver v. Wagstaff*, Id. 317; *Fenn v. Roe*, 1 New Rep. 293.

(*m*) *Doe d. Aylesbury v. Roe*, 2 Chit. Rep. 183.

(*n*) *Doe v. Wright*, Barnes, 190. See *Doe d. Aylesbury v. Roe*, 2 Chit. Rep. 183; Lofft, 401; and see *Goodtitle v. Badtitle*, 1 B. & P. 385.

(*o*) *Anon.* 2 Chit. 181.

why it should not be a good service (*p*). Where the service of the declaration was on an attorney, who represented himself to be the agent of the tenants in possession, and would appear for them, the Court granted a rule *nisi* that it should be good service, and directed the rule to be served on the attorney (*q*). In another case, a rule absolute was granted for judgment against the casual ejector, where the service had been made on a person on the premises believed to have been left there by the tenant who was out of the way, and also on her attorney; and a letter was sent by the twopenny-post, according to the attorney's direction, to the tenant's last place of abode (*r*). Where several ineffectual attempts had been made to serve the tenant, who was denied by the servant, and the last time the servant stated that his master was in his house, but refused to be seen by any person, unless he sent in his name and message, whereupon the declaration was delivered to the servant, the Court granted a rule *nisi* (which was afterwards made absolute), that it should be deemed good service (*s*). And in another case, a rule *nisi* was granted where the servants refused to call their master, or to receive the ejectment, saying they had no orders to take in papers (*t*). And when the tenant absconds or keeps out of the way, to avoid being served, a copy of the declaration should be delivered to his relation or servant, or some other person on the premises, to whom the notice should be read over and explained, and another copy affixed on the outer door, or some conspicuous part of the premises, and thereupon, if it be made appear to the satisfaction of the Court, that the tenant absconded, or kept out of the way, to avoid being served, but not otherwise, the Court, on an affidavit of the facts, will grant a rule *nisi*, that the service on his relation or servant, &c. shall be deemed good service, and direct in what manner the rule shall be served (*u*).

As regards the *time of the service*:—it was formerly requisite that the declaration and notice should be served before the *essoign day* of the term (*x*); but now, by the rule of *T. T. 1 W. 4*, declarations in ejectment may be served before the *first day* of any term, and thereupon the plaintiff will be entitled to judgment against the casual ejector in like manner as formerly upon declarations served before the *essoign day*. And when a tenancy has expired, or a right of entry has occurred to a *landlord*, in or after Hilary or Trinity terms, he may, under the *1 W. 4, c. 70, s. 36*, at any time within 10 days afterwards, serve a declaration in ejectment, specially intitled of the day next after the day of the demise in such declaration, whether the same shall be made in term or vacation, with a notice

(*p*) *Anon.* 2 Chit. Rep. 182; *Doe d. Osbaldistoun v. Roe*, 1 Dowl. P. C. 456;

*Doe d. Cockburn v. Roe*, Id. 692.

(*q*) *Anon.* 2 Chit. Rep. 181. See *Doe d. Walker v. Roe*, 2 C. & J. 381.

(*r*) *Anon.* 2 Chit. Rep. 179.

(*s*) *Doe d. Hervey v. Roe*, 2 Price, 112; *Doe d. Halsey v. Roe*, 1 Chit. Rep. 100;

(*n. a*). See *Doe d. Cockburn v. Roe*, 1

Dowl. P. C. 692.

(*t*) *Douglass v. —*, 1 Str. 575.

(*u*) *Douglass v. —*, 1 Str. 575; Tidd, 9th ed. 1214, and cases there cited; *Doe d. Osbaldistoun v. Roe*, 1 Dowl. P. C. 456, post, 535.

(*x*) *Roe d. Bird v. Doe*, Barnes, 172; *Roe d. Hambrook v. Doe*, 14 East, 441.

thereunto subscribed, requiring the tenant in possession to appear and plead thereto within 10 days (y). The service must not be made on a Sunday; even where the declaration was left at the house of the tenant in possession on Saturday, and received by him on the next day, Sunday, it was held, that this was service of process on a Sunday, within the 29 C. 2, c. 7, s. 6, and void (z).

*In serving the declaration, the notice at the foot of it should be read over, or at least the purport of it should be signified, and the nature and meaning of the service explained, to the person upon whom it is served, so as to be fully understood by him.* It will suffice to read it over without explaining it, or to explain it without reading it over (a). Where a declaration was tendered to the tenant's wife in her shop, upon the premises, and the person serving it attempted to read to her the notice, but she refused to hear it, and left the shop, and the declaration and notice were thereupon left in the shop; the Court were of opinion that the notice should have been read aloud in the shop, but granted a rule to shew cause why this should not be deemed service (b). In another case, when the attorney, after explaining the contents of the declaration to the tenant's wife, was proceeding to read the notice, she said she could read it herself, and ran her eye over it as if she read it; this was holden to be sufficient (c). Service of the declaration before the first day of the term, and an explanation of the notice after it, will not be sufficient (d).

*Affidavit of service.*] After serving the declaration and notice, *en-gross an affidavit of the service on plain paper, and let it be sworn before a Judge in town, or a commissioner in the country* (e). It may, it seems, be made before the attorney in the cause (f). It may be made either by the person who actually served the declaration, or by one who was present at the time of the service (g). It should not be intitled in the names of the real defendants (h). It must appear from the affidavit, that the declaration has not been served on the "tenant" in possession; merely stating a service on the "person" in possession, or upon a person whom deponent believes to be tenant in possession, would be insufficient (i); stating that it was served on the tenant "as executor," would not suffice (j), nor would an affidavit that the service was on a tenant in "legal" possession (k). The affidavit must also be certain and positive: an affidavit of ser-

(y) *Post*, 569; *Doe v. Roe*, 1 Dowl. P. C. 304, 2 C. & J. 123, S. C.

(z) *Doe Warren v. Roe*, 8 D. & R. 342; and see *Doe v. Roe*, *Id.* 592, 5 B. & C. 764, S. C.

(a) *Doe v. Roe*, 1 Dowl. P. C. 428.

(b) *Doe Neale v. Roe*, 2 Wils. 263.

(c) *Goodright d. Waddington v. Thrust-out*, 2 W. Bl. 800; and see *Doe Jones v. Roe*, 1 Dowl. P. C. 518.

(d) *Doe v. Roe*, 1 D. & R. 563.

(e) See the forms, *Chit. Forms*, 443.

(f) *Doe Cooper v. Roe*, 2 Y. & J. 284.

(g) *Goodtitle v. Badtitle*, 2 B. & P. 120.

(h) *Anon.* 2 Chit. Rep. 181.

(i) *Tidd*, 1245; *Doe v. Roe*, 1 Chit. Rep. 574; *Doe v. Badtitle*, 1 Chit. Rep. 215; *Id.* 505.

(j) *Doe v. Roe*, 2 C. & J. 45, 1 Dowl. P. C. 295, S. C.

(k) *Doe Osbaldiston v. Roe*, 30 April, 1832, K. B.

vice on *J. S.* tenant, or *C.* his wife, was holden bad (*l*): so was an affidavit of service on the wives of *A.* and *B.*, "who, or one of them, are tenants (*m*):" so was an affidavit of the service "on a woman in the premises, who represented herself to be the wife of the tenant in possession," without adding, that the deponent believed her to be his wife (*n*). But an affidavit of service on the wife, "as she informed the deponent, and as he verily believed," has been deemed sufficient (*o*). A affidavit of service on the wife of the tenant of the premises, must shew that she was living with her husband (*p*). It must appear from the affidavit, that the notice was read over or explained to the party on whom it was served, or that he understood its import or contents (*q*). If the affidavit states that the tenant has since acknowledged that he understood the meaning and intention of the service, it will suffice, without any statement of the reading or explanation (*r*). Where the service is made upon a servant or other third person, on the premises, the affidavit must shew that the tenant has acknowledged that he has received the declaration, or to have known of the service thereof, previous to the first day of the term (*s*): the affidavit must shew when such acknowledgment was made (*t*). If no one be in the house or premises, and the declaration is stuck up thereon, the affidavit must state the deponent's belief that the tenant absconded, to avoid the service (*u*): it must also state, that a copy of the declaration was left, as well as affixed on the premises, and that the deponent, or others, had used diligent means to discover the tenant's residence, which is still unknown (*x*): it is not sufficient to state that the lessor of the plaintiff had been unsuccessful in two attempts to find the defendant at his dwelling house, and had, therefore, stuck up the declaration on the premises (*y*).

When several tenants have been served with copies of the same declaration, if it is meant but as one ejectment, and to be followed by one judgment, one affidavit of the service of all is sufficient, annexed to the copy of one declaration; but if the ejectments are made several, so as to have several judgments, writs of possession, &c., then an affidavit of the service must be annexed to separate copies of the declaration (*z*).

Where the service is good, but the affidavit defective, the defect may in general be remedied by a supplemental affidavit (*a*).

*Amending declaration and notice.*] If the declaration be defective,

- (*l*) *Birbeck v. Hughes*, Barnes, 173.
- (*m*) *Harding v. Greensmith*, Barnes, 174.
- (*n*) *Doe Simmons v. Roe*, 1 Chit. Rep. 228; *Doe Walker v. Roe*, 4 M. & P. 11; *Doe Smith v. Roe*, 1 Dowl. P. C. 614.
- (*o*) *Doe Deily v. Roe*, Barnes, 194.
- (*p*) *Doe Briggs v. Roe*, 1 Dowl. P. C. 312, 2 C. & J. 202, S. C.
- (*q*) See ante, 534; *Doe v. Roe*, 1 Dowl. P. C. 428; *Doe Jones v. Roe*, Id. 518.
- (*r*) *Doe Thompson v. Roe*, 2 Chit. Rep. 186; *Anon.* Id. 184; *Doe Quintin*

- v. Roe*, Ad. Eject. 215.
- (*s*) *Doe Wilson v. Roe*, Ad. Eject. 209; *Doe Tindale v. Roe*, 2 Chit. Rep. 180.
- (*t*) *Anon.* 2 Chit. Rep. 187.
- (*u*) *Doe Lowe v. Roe*, 1 Chit. Rep. 505, n, 2 Chit. Rep. 177, *Harrison L. & T.* 833.
- (*x*) *Doe Tarluy v. Roe*, 1 Chit. Rep. 506, 505, n; *Anon.* 2 Chit. 177, ante, 533.
- (*y*) *Harrison, L. & T.* 833.
- (*z*) 2 Sell. Pract. 178.
- (*a*) 2 Sellon, 99; *Tidd*, 1216.

the plaintiff may in general have leave to amend it, even after plea pleaded (b). Thus, leave has been given to amend the declaration, in the venue (c), in the demise (d), in the term stated in the demise (e), (when it is clear the amendment would work no injustice to the opposite party (f)), in the parcels (g); and sometimes the notice at the foot of it, in the time of appearance (h), and in the name subscribed to it (i).

*Judgment against the casual ejector.*] If the tenant, upon whom the declaration and notice were served, does not take steps to have himself made a party to the action (that is, unless he, in due time, enter into the common consent rule to confess lease, entry, ouster, and possession), the plaintiff becomes entitled to judgment by default against the casual ejector. *The motion for this judgment should, in general, be made some time in the term in which the tenant was required by the notice to appear (j); in town causes, it is usually made at the beginning of the term; in country causes, usually at the latter end of the term.* The motion cannot be made after the expiration of two terms after the service of the declaration (k). In town causes, if the motion be made at the beginning of the term, the tenant must appear in four days after, or the plaintiff may sign judgment; if the motion be deferred to the latter end of the term, the Court will order the tenant to appear in two or three days, and sometimes immediately, that the plaintiff may proceed to trial at the sittings after term; though, if the motion be not made before the last four days of the term, the tenant need not appear until two days before the essoign day of the subsequent term (l). If the ejectment be by a landlord under the provisions of the 1 W. 4, c. 70, s. 36, see the directions, post, 568.

In order to move for judgment against the casual ejector, *annex the above mentioned affidavit of service to the declaration, and indorse on them—"To move for judgment against the casual ejector;" get it signed by counsel.* The motion paper requires only counsel's signature, if the declaration have been regularly and perfectly served on the tenant or his wife; but if the service were in any other manner, the motion must be made in Court, and the particular manner of the

(b) See cases in Harr. L. & T. 847, 848.

(c) Imp. C. B. 636.

(d) *Doe Hardman v. Pilkinton*, 4 Bur. 2447; *Doe Beaumont v. Armitage*, 1 D. & R. 173, 2 Chit. 302, S. C.; *Anon.* 1 Chit. Rep. 536; *Doe Rumsford v. Miller*, Id.; *Adams on Eject.* 199.

(e) *Roe Lee v. Ellis*, 2 W. Bl. 940; and see *Vicars v. Haydon*, 2 Cowp. 841; *Doe v. Rendell*, 1 Chit. Rep. 535.

(f) *Doe Reynell v. Tuckett*, 2 B. & Ald. 773; *Brudney v. Hasselden*, 1 B. & C. 121, 2 D. & R. 227, S. C.; and see Harr. L. & T. 848.

(g) Pr. Reg. 16; *Anon.* 1 Chit. Rep. 537, n; *Doe Lawrie v. Dyball*, 1 M. & P.

330, 8 B. & Cres. 70, S. C.

(h) *Doe Bass v. Roe*, 7 T. R. 469. The tenant ought to be apprized in time of the mistake, *Anon.* 2 Chit. Rep. 171.

(i) *Hazelwood v. Thatcher*, 3 T. R. 351. See *Goodtitle v. Notille*, 5 B. & Ald. 849.

(j) *Fenwick's case*, 1 Salk. 275; 2 Ken. 272; R. T. 18 C. 2 (a); R. E. 2 G. 4, 4 B. & Ald. 539.

(k) *Doe v. Roe*, 1 Dowl. P. C. 495.

(l) See Harr. L. & T. 834. The practice is different in the Common Pleas; and *query* now as to the essoign day since the 1 W. 4, c. 70, as it is done away with for all purposes as part of the term.

service mentioned. (See ante, 532). Take the motion paper to the clerk of the rules, and draw up the rule; pay him 7s.; and 6d. for every tenant after the first. This is a rule nisi for judgment, unless the tenant shall appear and plead within the time therein mentioned (m). This rule is not served on the tenant in possession, nor has he any actual notice thereof; and his attorney, therefore, must search for the rule, and at all events appear and plead before the expiration of the time thereby limited; or judgment may be signed against the casual ejector (n). But when the motion for judgment has been made to the Court, and a rule nisi only granted, that rule must be served either personally, or in the manner prescribed by the terms of the rule; and there must be an affidavit of such service, and compliance with the terms of the rule, and a subsequent motion to make such rule nisi absolute (o). One rule is sufficient, where there are several tenants, although the name of each tenant was separately prefixed to the notice served on him, instead of the names of all (p). This rule must be drawn up and taken from the office of the clerk of the rules, within two days after the end of the term in which it was moved for; otherwise it shall not be drawn up or entered, nor shall any further proceedings be had in such ejectment. (R. M. 31 G. 3, r. 1) (q).

At the expiration of the time limited for the tenant's appearance (vide post, 538), search the books at the Judge's chambers for a plea and consent rule upon the part of the tenant; and if none be filed, then make an incipitur on plain paper, and an incipitur on the roll (as in the case of a judgment by default, when final, see ante, 505), and upon producing your rule for judgment, the clerk of the judgments will sign judgment. Pay him 4s. 2d. if the ejectment be by original. An appearance must previously be entered for the casual ejector (r); or if by bill, then common bail must be previously filed for him (s). There is no occasion for a rule to plead (t), nor for a demand of plea. Judgment must not be signed before the afternoon of the day after that when the rule for judgment expired; and if Sunday be the last day, the plaintiff must wait till the afternoon of Tuesday (u). There is no distinction, in point of effect, between this judgment and a judgment obtained upon a verdict against the tenant or other person claiming title. It should seem, that unless a rule for judgment has been duly entered or given, the defendant may appear and plead at any time before judgment has been signed against the casual ejector (x).

When judgment against the casual ejector has been signed, engross a writ of possession on parchment (y), take the judgment paper and writ to the sealer of the writs, who will seal it; pay 7d. Take

(m) See the form as to the whole of the premises, Chit. Forms, 447; the like, as to part, Id.; the like, where there are several tenants, Id.

(n) Chit. Sum. Pract. 219.

(o) Id. 220.

(p) Doe *Burton v. Roe*, 7 T. R. 477, ante, 530.

(q) 4 T. R. 1.

(r) R. M. 33 C. 2; 2 Sellon, 100. See the form of *præcipe* for appearance,

Chit. Forms, 448; and of the judgment, Id.

(s) Tidd, 1224. See form, Chit. Forms, 452.

(t) Ad. Eject. 2nd ed. 222.

(u) Doe *v. Hedges*, 4 D. & R. 393; and see *Hyde v. Thurstout*, Sayer, 303.

(x) Chit. Sum. Prac. 221, ante, Vol. 1, 202.

(y) See the form, Chit. Forms, 470.

*the writ to the sheriff's office, and get a warrant on it; and give the warrant to an officer to execute. As to the execution of this writ, vide post, 553.*

*Setting aside judgment, &c.]* At any time before the writ of possession is executed, the Court, or a Judge in vacation, upon an affidavit of merits, or that the defendant believes there is a good defence, may set aside or stay the proceedings, on payment of costs, and let in the tenant or other person claiming title to defend the action, by obliging the plaintiff to accept a plea (a); but the Court will not, in general, grant this indulgence to parties, after execution executed (a); or, as it seems, after a trial has been lost (b). Where the landlord, after notice to quit, brought an ejectment against the tenant, and obtained a verdict, and the latter still continuing in possession, he distrained on him for rent, which became due after the verdict, and which he paid, it was held, that the execution in the ejectment could not be stayed, as the tenant should have disputed the distress (c). In a late case, however, the Court of Exchequer set aside a regular judgment and writ of possession executed, on an affidavit by the attorney for the landlord and tenant, that he had received no instructions for entering an appearance, but had neglected it, owing to matters personally affecting himself, which had prevented his attending to it (d). In another case, a judgment against the casual ejector was set aside after execution executed, on the ground that there had been no notice given to the landlord by the tenant in possession of the premises, and consequently no trial of the merits; and the terms made were, that the landlord should pay costs to the lessor of the plaintiff, and that the possession should be, in the meantime, retained by the latter (e). And in cases of collusion, the Court will always thus interfere (f). If the Court will not interfere, then the landlord's or tenant's remedy is to bring an ejectment and try his right (g).

*Appearance and plea by tenant.]* The appearance is entered and plea delivered, either by the tenant upon whom the declaration and notice was served, or by his landlord, or by both jointly, or by some other person claiming title to the premises. In *town causes*, where the notice requires the tenant to appear on the first day of the term, he is allowed four days, after the rule for judgment already mentioned has been drawn up and entered, to appear and plead, provided the rule be drawn up and entered before the last four days of the term; or if drawn up and entered within the last four days of term, he

(a) *Anon.* 2 Salk. 516; *Dobbs v. Passer*, 2 Str. 975; *Doe Troughton v. Roe*, 4 Bur. 1996.

(a) *Doe Ledger v. Roe*, 3 Taunt. 506; *Goodtitle v. Badtitle*, 4 Taunt. 820.

(b) 2 Sellon, 178.

(c) *Doe Holmes v. Davies*, 2 Moore, 581.

(d) *Doe Shaw v. Roe*, 13 Price, 260.

(e) *Doe Ingram v. Roe*, 11 Price, 507, *post*, 539.

(f) See *Doe Grocers' Company v. Roe*, 5 Taunt. 205; *Goodtitle v. Badtitle*, 4 Taunt. 820.

(g) See 2 Sellon, 230; *Harr. L. & T.* 870.

has until two days before the essoign day (*f*) of the following term allowed him. But if the notice were to appear generally of the term, he shall have the entire of the term to appear and plead. In *country causes*, the tenant, &c. had formerly until four days exclusive after the issuable term previous to the assizes, allowed him for the same purpose (*g*); but now, by *R. M. 1821* (*h*), in *country ejectments*, where the declaration is served before the first (*R. T. 1 W. 4*) day of Michaelmas or Easter term, the time for the appearance of the tenant shall be within four days after the end of such terms respectively: and the same, of course, as to Hilary and Trinity terms.

It should be remarked, that a tenant is not bound to appear, even although his landlord offer to indemnify him (*i*); nor can the landlord appear and defend the ejectment in the tenant's name, without his consent (*j*); and if he do, the appearance and plea would be irregular, and the Court would order it to be withdrawn (*k*). The landlord, however, may have leave to appear and defend the action in his own name, as shall be stated presently; and for this purpose the tenant, when served with a declaration in ejectment, is bound to give immediate notice thereof to his landlord, under pain of forfeiting three years' improved rent of the premises (*l*). Where the tenant had not given notice to the landlord of the ejectment, and there was judgment against the casual ejector, the Court set aside the judgment, and ordered the tenant to pay all the costs to the lessor of the plaintiff, on the landlord's entering into the usual rule to try the title (*m*). On the other hand, if the ejectment be brought by the landlord, or any other person claiming under him, the Court will not let the tenant in to defend the action on any supposed defect of title (*n*).

The mode of appearing for the tenant is thus: *Get a blank consent rule at the rule office, and fill it up* (*o*). By *R. M. 1820* (*p*), the defendant shall specify in the consent rule for what premises he intends to defend, and shall therein consent to confess upon the trial that he (if he defend as tenant, or if he defend as landlord, then that his tenant) was in possession of the premises at the time of the service of the declaration. The consent rule need not set out the christian and surname of the lessor of the plaintiff (*q*). Where the ejectment has been brought by one tenant in common against another (*r*), or by one coparcener or joint-tenant against another (*s*), the Court, upon application, will let in the tenant, &c. to defend, upon his confessing lease and entry only, so as to put the lessor of the plaintiff to

(*f*) Query as to the essoign day, see ante, 536, n. (*h*).

(*g*) See *Hyde d. Culliford v. Thrustout*, Say. 303; *Barnes*, 186; *Mason d. Kendale v. Hodgson*, 1d. 256.

(*h*) 4 B. & Ald. 539.

(*i*) *Right v. Wrong*, *Barnes*, 173.

(*j*) *Roe Jones v. Doe*, *Barnes*, 178.

(*k*) 2 Sellon, 179.

(*l*) 11 G. 2, c. 19, s. 12. See *Buckley v. Buckley*, 1 T. R. 647; *Crocker v. Fo-*

*thergill*, 2 B. & Ald. 652.

(*m*) *Doe Troughton v. Roe*, 4 Burr. 1996; see ante, 538.

(*n*) *Driver v. Lawrence*, 2 W. Bl. 1259.

(*o*) See the form, Chit. Forms, 450.

(*p*) 2 Chit. Rep. 375, 379.

(*q*) *Doe Spencer v. Reid*, 3 Moore, 96.

(*r*) *Oates v. Brydon*, 3 Bur. 1895.

(*s*) *Doe Gigner v. Roe*, 2 Taunt. 397; and see *Doe White v. Cuff*, 1 Camp. 173; *Rosc.* 2nd ed. 329.



prove at the trial an actual ouster; provided the tenant do not dispute the plaintiff's title as joint tenant, &c. (t). If the ejectment be upon a supposed original, strike out the words "and file common bail" in the printed form, and instead of the words "bill," insert "writ." Let the defendant's attorney sign the rule, leaving room above his signature for that of the attorney for the plaintiff. Then, if the ejectment be by original, make out a *præcipe* for the appearance (u); and take it to the filacer of the proper county, who will thereupon enter an appearance for the tenant; pay him 3s. 6d. (x), and if more than one defendant, pay him 4d. for each of the others. Or if the ejectment be by bill, get a common bail piece at the stationer's; fill it up (y); and take it, together with the consent rule, to the clerk of the common bails, who will number (R. E. 30 G. 3.) and file the bail piece, for the tenant; pay him 1s. 6d., if in term or within six days after it; and 4d. additionally after that time, for a post terminum. The filacer, or clerk of the common bails, will at the same time mark the consent rule. Next, whether the ejectment be by original or by bill, engross the general issue upon plain paper (z); annex the rule to it, and leave both at the Judge's chambers. Pay the Judge's clerk 2s.

According to the usual terms of the consent rule, the defendant can plead the general issue only; but the Court, upon application, may give him leave to plead to the jurisdiction, (*ante*, 470), such as a plea of ancient demesne, or the like (a). It is necessary to remark that the plea of ancient demesne in ejectment must be pleaded within four days, or within the first four days of the term (b), although that happen to be before the expiration of the time limited for the tenant's appearance. The Court have allowed it to be filed *de bene esse*, within the first four days of the term, pending a rule *nisi* for permission to allow the plea to be pleaded (c). A plea *puis darrein continuance*, of a release by one of the lessors of the plaintiff, is bad on demurrer (d). If the plaintiff after issue, and before trial, enter into part of the premises, the defendant, at the assizes, might plead it as a plea *puis darrein continuance*: nor is it in the discretion of the Judge to reject it or not, for he is bound to receive it, being made part of the record, and as the plaintiff cannot reply to it at the assizes, the trial is stopped (e). Where the name of the plaintiff's lessor was inserted in the body of the plea (as the person complaining) instead of that of the nominal plaintiff, judgment signed against the casual ejector, under the idea that the plea was null and void, was set aside with costs as irregular (f). The defendant may obtain time to plead as in other cases. See Vol. 1, p. 198.

(t) *Anon.* 7 Mod. 39.

(u) See the form, Chit. Forms, 452.

(x) It should seem that the rule of M. T. 3 W. 4, r. 2, is not applicable to ejectments.

(y) See the form, Chit. Forms, 452.

(z) Id.

(a) See as to affidavit necessary to support an application for leave to

plead this plea of ancient demesne, *Doe Rust v. Roe*, 2 Bur. 1046.

(b) *Denn Wroot v. Fenn*, 8 T. R. 474. See *ante*, 470.

(c) *Doe Morton v. Roe*, 10 East, 523.

(d) *Doe Byme v. Brewer*, 4 M. & Sel. 300, 2 Chit. Rep. 323, S. C.

(e) 2 Sell. 192, *ante*, Vol. 1, p. 288.

(f) 2 Sell. 188.

When the time limited for the tenant's appearance has expired, let the plaintiff's attorney call at the Judge's chambers, and get the consent rule; and, after separating the plea from the rule, let him sign the latter, and take it to the clerk of the rules, who will thereupon draw up the rule (h).

If the plaintiff delay taking the plea, &c. from the Judge's chambers, or delay proceeding afterwards, the defendant may rule him to reply; and if he do not reply within the time limited by the rule, which is four days, the defendant may sign judgment of *nonpros* (i). The defendant, however, in such a case, where the lessor of the plaintiff has never entered into the consent rule, will not be entitled to costs (k), the plaintiff being a mere nominal adversary. But he will be entitled to costs on a *nonpros*, for not replying, when the lessor of the plaintiff has joined in the consent rule.

When you have got the rule from the clerk of the rules, make up the issue, as directed post, 545 (l); annex a copy of the rule to it, and deliver it to the defendant's attorney.

If the tenant defend only for part, the plaintiff may of course sign judgment against the casual ejector for the residue.

*Appearance and plea, &c. by landlord, and others.]* We have already seen, *ante*, 539, that although the tenant in possession is not bound to appear and defend the action, yet he is obliged, under a penalty, to give his landlord notice, when a declaration in ejectment has been served on him. And by 11 G. 2, c. 19, s. 13, the Court may allow the landlord to make himself defendant, by joining with the tenant, if the tenant appear; but if the tenant neglect or refuse to appear, judgment shall be signed against the casual ejector for want of such appearance; yet, if the landlord shall desire to appear by himself, and consent to enter into the like rule the tenant must have entered into had he appeared, the Court shall permit him to do so; and shall order a stay of execution, upon the judgment, against the casual ejector, until they shall make further order therein. A liberal construction has been given to this statute; and the Court have let in the heir of the landlord, although he had never been in possession (m), a remainder-man under the same title with the original landlord (n), a devisee in trust (o), and a mortgagee (p), severally, to defend the action. And where a lord, claiming by escheat, applied to be admitted a defendant in an action brought by one claiming as heir, the Court directed the lord to bring an ejectment, and the heir to be admitted to defend; and said, that if the lord refused, they would discharge his rule to be admitted; or if the heir refused, they

(h) See the form, Chit. Forms, 450.

(i) *Goodright d. Ward v. Badtittle*, 2 W. Bl. 763.

(k) *Id.*

(l) See Chit. Forms, 460.

(m) *Lovelock v. Dancaster*, 4 T. R. 122; and see 3 T. R. 783, S. C.

(n) *Lovelock v. Dancaster*, 3 T. R. 783.

(o) *Lovelock v. Dancaster*, 4 T. R. 122. See *Roe Leak v. Doe*, Barnes, 183.

(p) *Doe Tilyard v. Cooper*, 8 T. R. 645; *Doe Tubb v. Roe*, 4 Taunt. 887.

would allow the lord to defend (*q*). But a mortgagee would not be permitted to come in, and defend, as landlord, unless he be interested in the result of the suit (*r*). Where the tenant came into possession, under an agreement with the lessor of plaintiff, for a term of years, but afterwards disclaimed the tenancy, the Court held that a stranger, claiming title, should not be admitted to defend; or, that if he happened to be admitted, he should not be allowed to impeach the title of the lessor of plaintiff; or to set up any other defence than that of which the tenant might have availed himself, had he appeared (*s*). Where upon an ejectment against the tenant in possession, who came into possession as tenant of the lessor of the plaintiff, a third person, having an adverse title, entered into a consent rule to defend, as landlord, the Court discharged such rule, with costs (*t*).

The Court have, in some instances, even after judgment against the casual ejector, let the landlord in to defend the action. (*See ante*, p. 538.)

Where a party is landlord of the whole, and tenant of part of the premises, and the tenants are paupers, if he alone be the real party defending, he should appear, and defend as landlord for the whole; or, in default thereof, a rule or order may be obtained for setting aside the appearances and pleas of the tenants, and judgment may be signed against the casual ejector (*u*).

The motion for the landlord to be admitted to defend, either with the tenant, or by himself, is a motion of course, and requires only counsel's signature. *Get the motion paper signed by counsel, take it to the clerk of the rules, and draw up the rule (x); pay 5s. 6d.; and annex a copy of it to the consent rule and plea, before you leave them at the Judge's chambers. You then proceed, as in ordinary cases, where the tenant appears alone. (See ante, p. 539).* If the landlord appear by himself, the rule gives liberty to the plaintiff to sign judgment against the casual ejector, until further order (*a*). The plaintiff, thereupon, immediately signs judgment against the casual ejector; and, if the landlord does not appear at the trial, the plaintiff, upon producing the *postea* and office copies of the rules, must move for leave to sue out execution, and the Court will accordingly grant a rule *nisi* (*b*). But if the landlord does appear, and the cause be tried, and a verdict and judgment obtained against him, execution may be issued against him without any further order of the Court (*c*).

*Cognovit (d).*] The defendant, after entering into the consent rule, may, if he wish, withdraw his plea and confess the action (*e*). The

(*q*) *Fatclaim v. Shamtitle*, 3 Bur. 1290.

(*r*) *Doe Pearson v. Roe*, 6 Bingh. 613, 4 M. & P. 437, S. C.

(*s*) *Doe Knight v. Smythe*, 4 M. & Sel. 347.

(*t*) *Doe Horton v. Rhys*, 2 Y. & J. 88.

(*u*) *Thrustout v. Shenton*, 10 B. & Cres. 111, *post*, 544.

(*x*) See the form, Chit. Forms, 451.

(*a*) See the form of the rule, Chit.

Forms, 451.

(*b*) See the form of the rule, Chit. Forms, 468.

(*c*) See *Doe Lucy v. Bennett*, 4 B. & Cres. 897, 7 D. & R. 261, S. C.; *Doe Roberts v. Gibbs*, 1 Chit. Rep. 47; *Doe Simons v. Masters*, Id. 233, *post*, 554.

(*d*) See *ante*, 486, as to *cognovits* in general.

(*e*) See the form of *cognovit*, Chit. Forms, 453.

plaintiff, in such a case, after a *relicta verificatione* entered, may sign judgment in pursuance of the *cognovit*, as directed *ante*, 490(*f*). This is a final judgment, and has the same effect as a judgment upon verdict. Where the landlord defended the action at his own expense,\* but in the name of his tenant, the Court, upon application, set aside a judgment entered up on a *cognovit* given by the tenant, and let in the landlord to defend the action in his own name (*g*).

*Particulars of premises, &c.*] The defendant, if he have any doubt as to the lands, &c., for which the ejectment is brought, may take out a summons before a Judge, calling upon the plaintiff to give him a bill of particulars (*h*). Also, where the ejectment is brought for a forfeiture, the Court, upon application, will rule the lessor of the plaintiff to give the defendant a particular of the covenants and breaches, &c., on which he means to insist that the defendant has forfeited his term, and that he shall not be allowed to give evidence at the trial of any thing not contained in those particulars (*i*). The Court or a Judge may also, under circumstances, order the defendant to give a particular of the premises for which he defends. Where the lessor of the plaintiff is unknown to the defendant, the latter may call for a particular of his residence or place of abode from the opposite attorney, and if he refuse to give it, or give in a fictitious account of a person who cannot be found, the Court will stay proceedings until security be given for costs (*k*).

*Security for costs (l).* *Staying or setting aside, or consolidating proceedings.*] The Court will exercise an equitable jurisdiction over the proceedings in an action of ejectment, which, for the purposes of justice and convenience, may be said to be peculiarly its own creature (*m*).

The defendant may move to stay proceedings until a guardian shall be appointed for an infant lessor, to answer costs (*post*, Book 4, Part 1, Chap. 11); or, where the lessor of plaintiff is abroad or dead, or is unknown, until security be given for costs. (*Id.*). So, the Court will stay proceedings in a second action, until the costs in the first shall be paid, if the second action be in the slightest degree vexatious. (*Id.* Chap. 10)(*n*). If ejectment be brought for nonpayment of rent, or of principal and interest due on a mortgage,\* the proceedings may be stayed upon payment of the money to the landlord or mortgagee, or, in

(*f*) See form of *præcipe* for appearance, Chit. Forms, 452; and of entry on roll, *Id.* 453.

(*g*) *Doe Locke v. Franklin*, 7 Taunt. 9, 1 Chit. 390, n., S. C. See *Payne v. Rogers*, 1 Doug. 407, 2 H. Bl. 349, S. C.

(*h*) *Doe Saunders v. Newcastle, Duke of*, 7 T. R. 332. See form of summons and particulars, Chit. Forms, 456.

(*i*) *Doe Birch v. Phillips*, 6 T. R. 597. *Tenny v. Moody*, 3 Bing. 3, 10 Moore, 252, S. C. See form of particulars,

Chit. Forms, 456.

(*k*) Tidd, 476; and see *ante*, Vol. I, p. 29.

(*l*) As to the recognizance for costs in ejectments under 1 G. 4, c. 87, see *post*, 564.

(*m*) *Per Bayley, J.*, 10 B. & Cren. 111.

(*n*) *Doe Selby v. Alston*, 1 T. R. 491; *Keene d. Angel v. Angel*, 6 T. R. 740; and see *Doe Rees v. Thomas*, 4 D. & R. 145; *Doe Williams v. Winch*, 3 B. & Ald. 602; *Harr. L. & T.* 871.

case of their refusal, upon payment of it into Court. (*Id. post*, 562)(*o*). But where the defendant moved to stay proceedings in an ejectment, upon the ground that the title of the lessor of the plaintiff had determined since the commencement of the action, the Court refused the rule, saying, that the plaintiff had a right to proceed for the recovery of his damages and costs (*p*).

Where a demise is inserted in the declaration in the name of a party without his consent, the Court on motion will order it to be struck out, unless the justice of the case would be defeated, and the party has had an indemnity tendered to him before the ejectment was brought (*q*). The application should be made on behalf of such party, and as speedily as possible after he has knowledge of the proceedings (*r*).

If the appearance and plea be entered in the name of the tenant, or a person against his consent, the Court will order it to be set aside. (*Ante*, *p.* 539).

Where several ejectments are brought for the same premises upon the same demise, the Court, on motion (which is for a rule *nisi*), or a Judge at chambers, will order them to be consolidated (*s*). The lessor of the plaintiff having brought three ejectments in the King's Bench for the same property, the Court stayed the proceedings in two of them, and compelled the plaintiff to confine himself to one, upon certain terms, which rendered it probable that, in the event, he would have to pay the costs: whereupon he brought an ejectment for the same property in the Common Pleas, but the proceedings thereon were stayed by that Court (*t*).

Where there are several defendants to whom the plaintiff delivers declarations, for the recovery of the same premises, the Court would probably now, since the 3 & 4 *Will.* 4, c. 42, (which gives one of several defendants who is acquitted his costs), on the motion of the plaintiff, join them all in one declaration, although they are severally concerned in interest, though before that act the Court would not do so (*u*).

The Court may, under circumstances, compel the real defendant to pay the costs, though he is no party to the record (*v*). And where A. was the tenant in possession of part of the premises and landlord of the whole, and B. and C., his tenants of other parts, were mere paupers, and the claimant brought three ejectments against them, to which three appearances were entered, it was considered, that the lessor of the plaintiff, to secure his costs of the proceedings against the paupers, should have applied to the Court, or a Judge at chambers, to set aside, with costs, the appearances and pleas, and for the lessor to be at liberty to sign judgment against the casual ejectors, unless the landlord would come in and defend, as landlord, for the premises in possession of his tenants, the two paupers; or (as A., the landlord, was one of the

(*o*) See the forms, *Chit. Forms*, 457.

(*p*) *Thrustout v. Grey*, 2 Str. 1056.

(*q*) *Adams Eject.* 186; *Doe Vine v. Figgins*, 3 Taunt. 440; *Doe Hammeck v. Corporation of Plymouth*, 2 Chit. Rep. 170.

(*r*) See *Doe Shepherd v. Roe*, 2 Chit. Rep. 171; *Id.* 170. See form of affida-

vit, *Chit. Forms*, 458.

(*s*) *Harr. L. & T.* 847; *post*, Book 4, Part 1, Chap. 8.

(*t*) *Doe Carthew v. Brenton*, 6 Bing. 469.

(*u*) *Run. Eject.* 187.

(*v*) *Doe Masters v. Grey*, 10 B. & Cres. 615.

parties served with the ejectment), that the lessor of the plaintiff might have obtained a consolidation rule, that the ejectments brought against the tenants should have abided the event of the verdict in the action against the landlord; taking care to have incorporated with such rule that A., (the landlord), should pay the costs of those ejectments brought against the tenants, in the event of such verdict being in favour of the lessor of the plaintiff (x). In the same case, A. (the landlord of the whole and tenant of part), instead of entering into the landlord's rule, obtained a rule for the consolidation of the three actions, and that the ejectment against his tenant B. should abide the event of the ejectment against his tenant C.: the ejectment was tried, and the lessor of the plaintiff obtained a judgment against C. and took possession of all the premises, and the Court compelled A. (the landlord), to pay the costs of that ejectment: but the lessor of the plaintiff was compelled to pay his own costs &c the application (y). In *Berkeley v. Dimery* (z), Lord Tenterden said, "that in an ejectment the tenant in possession must be sued; and the Court will not permit a person to put a mere pauper into possession merely to evade the costs."

As to setting aside the judgment, see *ante*, 538.

As to staying the proceedings where the plaintiff is endeavouring to proceed to a trial at the assizes under the provisions of the 1 W. 4, c. 70, s. 36, see *post*, 569.

*Replication, &c.*] The plaintiff will reply as in other cases. If he do not, and the defendant wish to compel him to do so, he should pursue the directions pointed out, *ante*, 541. A discontinuance is allowed in an ejectment. The Court will not, however, give the plaintiff leave to discontinue, after a special verdict has been had, in order to adduce fresh proof in contradiction to the verdict (a).

The defendant is entitled to costs on a *nonpros* for not replying when the lessor of the plaintiff has joined in the consent rule, or for not entering the issue or proceeding to trial according to notice, or on a judgment as in case of a nonsuit (b). (*Ante*, 541).

*Issue—Notice of trial—Jury process.*] When you have got the consent rule from the clerk of the rules, as directed *ante*, 541, make a copy of it; make up the issue upon plain paper, substituting the name of the tenant, &c. for that of the casual ejector, Richard Roe, in the declaration. In actions by original, it is more correct to entitle the issue of the same term as the declaration (c); although it may be (and usually is, when made up by the attorney) intitled of the term in or of which issue was joined, in the same manner as in actions by bill. In actions by bill, the issue must be intitled of the term in or of which issue is joined (d). In an ejectment by landlord, where the te-

(x) *Thrustout v. Henton*, 10 B. & Cres. 110.

(y) *Id.*

(z) 10 B. & Cres. 113, n.

(a) *Doe Gray v. Gray*, 2 W. Bl. 815.

(b) See form of judgment of *nonpros* for not replying, Chit. Forms, 459.

(c) See *Lee v. Clarke*, 2 East, 333.

(d) *Wood v. Miller*, 3 East, 204.

nancy has expired, or the right of entry accrued in or after either of the issuable terms, and the proceedings are under the 1 W. 4, c. 70, s. 36, the issue should be intitled specially of the day on which the declaration is specially intitled. In actions by *original*, the issue, after stating the term, commences at once with an entry of the declaration. In actions by *bill*, the issue commences with a memorandum, prefatory to the declaration and proceedings. The declaration and pleadings must be correctly copied in the issue (e), each forming a separate paragraph. In actions by *bill*, when the plea is of a term subsequent to that in which the issue states the bill to have been exhibited, it is necessary in the issue to continue the plea to the bill by an imparlance, otherwise it would be a discontinuance. But there is no need of continuing the bill down, from term to term, to the plea (f); for the course of this Court is at once to enter an imparlance to the first day of the term in or of which issue is joined, being the term of which the issue is intitled, without any regard to the times at which the plea and subsequent pleadings have been delivered. There is no need, however, of a continuance at all, if the issue be joined in the same term the bill is alleged to have been exhibited. Nor is it necessary to enter an imparlance on the replication, &c.; though, in fact, delivered of a subsequent term; for it is presumed to be of the same term with the preceding pleadings (g). In actions by *original*, it is unnecessary to enter any continuances on the plea, &c., in making up the issue; for the declaration, and all the subsequent pleadings, are supposed to be of the same term (h). After the pleadings are all copied in their order, the issue concludes, as in ordinary cases, with an award of the *venire facias*, as a continuation of the last paragraph (i). *The practice as to when and by whom the issue is to be made up, is the same as in ordinary cases, see ante, Vol. 1, 219, 220; and the practice as to when and by whom and how the issue is to be entered, is the same as in ordinary cases, see ante, Vol. 1, 221, 222. Indorse the notice of trial on the issue, and annex to it the copy of the consent rule, and deliver them to the defendant's attorney. Then sue out jury process, make up your Nisi Prius record, enter the cause for trial, and deliver your briefs to counsel, as in other cases (k).*

The time for giving notice of trial is the same as in ordinary cases, *see ante*, Vol. 1, 223, &c. But in an ejectment by a *landlord*, where the tenancy has expired, or a right of entry accrued, in or after either of the issuable terms, and the landlord has delivered a declaration in or after the term, within 10 days after his right of entry accrued, and with 10 days' notice to appear and plead thereto, then, at least six clear days' notice of trial before the commission day at the assizes must be given: the Judge may, however, postpone the trial to the next following assizes. (1 W. 4, c. 70, s. 36, *post*, 569). By appearing and

(e) See *Aaron v. Chaundry*, 4 D. & R. 41, 2 B. & C. 562, S. C.

(f) *Curlew v. Dudley*, 2 L. Raym. 872, 1 Salk. 179, S. C.; Hardw. 322.

(g) 5 Co. 75.

(h) 2 Saund. 1 e.

(i) See various forms, Chit. Forms, 460.

(k) See the forms of the issue and notice of trial, the *nisi prius* record, the jury process, &c. Chit. Forms, 460, 461, 462; Chit. Sum. Prac. 374.

defending at the trial, the defendant cures any defect in the notice (*l*). The record of *Nisi Prius* will in general be in the ordinary form; but in an ejectment by a landlord under the above act of 1 W. 4, c. 70, s. 36, when the declaration has been delivered in or after an issuable term specially intitled of the day after the demise, then, in making up the record, the proceedings should be stated accordingly. The Court have refused to set aside the verdict, on the ground that there was a variance between the description of the premises in the *Nisi Prius* record and the issue; it not being stated how the premises were described in the declaration delivered (*n*).

*Trial, &c.*] There being but one plaintiff in ejectment, in case there be several lessors, they cannot be heard separately by counsel, although they are separately interested (*o*). And if a landlord and tenant defend by different attornies, and have different counsel, but it appears that the tenant claims no title but what he derives from the landlord, the Judge at the trial will only allow one counsel to address the jury for the defence; but the party's counsel, who does not address the jury, will be at liberty to cross-examine, and also to call witnesses (*p*). The plaintiff should in general be prepared to produce the consent rule as part of his case: but where there is no doubt as to the identity of the premises sought to be recovered with those for which the tenant defends, he is not bound to produce it (*q*). Proof of the service of the declaration on the tenant in possession is sufficient, without producing the landlord's rule to shew that the defendant comes in as landlord (*r*). The defendant may of course give any special matter of defence in evidence under the general issue; and he will be entitled to begin to give evidence, and to the reply, as he would in ordinary cases if his special matter of defence were pleaded. (*See ante, Vol. 1, 275.*) Also, if the lessor of plaintiff entered into any part of the premises, after issue joined and before trial, the defendant may plead this matter *puis darrein continuance*. (*Ante, Vol. 1, 286.*) If the plaintiff do not proceed to trial in pursuance of his notice, without having countermanded it in time, the defendant shall have his costs of the day, or judgment as in case of a nonsuit, as in other cases. (*See post, Book 4, Part 1, Chap. 23, 24.*)

If the defendant do not appear and confess lease, entry, and ouster, and that he or his tenant was in possession of the premises at the time of the service of the declaration, then, after calling the defendant (and his attorney, if he be within the rule), the plaintiff must be called and nonsuit; and, at the prayer of the plaintiff, this fact is entered on the *postea*, namely, the plaintiff was nonsuit, because the defendant did not appear and confess lease, entry, and ouster, which

(*l*) *Doe Antrobus v. Jepson*, 3 B. & Adol. 402, *ante*, Vol. 1, 226.

(*n*) *Doe Cotterill v. Wyld*, 2 B. & Ald. 472.

(*o*) *Doe Fox v. Bromley*, 6 D. & R. 292.

(*p*) *Doe Hogg v. Tindale*, 3 C. & P.

565.

(*q*) *Doe Greaves v. Raby*, 2 B. & Adol. 948; *sed vide Doe Lambie v. Lambie*, 1 M. & M. 237.

(*r*) *Doe Giles v. Warwick*, 5 M. & Sel. 493.



will entitle him to sign judgment against the casual ejector (s). So if there be several defendants, and some of them do not appear and confess lease, entry, and ouster, a verdict must be taken for them, but with an indorsement on the *postea* that it was because they did not appear and confess (t); and the trial proceeds as to the defendants who have appeared (u). After being nonsuit for this cause, or on a verdict for the plaintiff, he could not, before the passing of the 1 W. 4, c. 70, obtain judgment till the ensuing term; but now (by the 38th section of that act, *post*, 553) if the Judge who tried the cause shall think fit to certify (w) that *possession* should be *immediately* obtained, a writ shall issue accordingly, and the costs may be taxed, and judgment signed and executed afterwards at the usual time, as if no such writ had issued; altering the form of the writ of execution accordingly, and as directed *post*, 553 (x). The Judge will not perhaps grant this Certificate on a nonsuit, unless an affidavit, stating the circumstances of the case, be laid before him (y). Supposing you do not obtain this certificate, and proceed according to this act, then the case must take its regular course; and you may, on or after the day in banc (z), or, if the cause be tried in the vacation, on the first day of the ensuing term, and even before the *postea* has been delivered out by the associate (a), sign judgment against the casual ejector, as directed *ante*, 536, in the same manner as if the defendant had never appeared and pleaded; and sue out execution (b). You may also proceed upon the consent rule for your costs (c), thus: *Give the defendant the usual one day's notice of taxation, as directed Vol. 1, p. 319; then take the judgment paper, consent rule, and postea, to the master, and he will tax the costs upon the rule. Then make a copy of the rule and allocatur; serve it personally on the defendant, at the same time shewing him the original rule; make a demand of the costs, and if he do not pay them, move the Court, upon an affidavit of the demand and refusal (d) for an attachment against him. This remedy by attachment is in general the only one the plaintiff has for his costs, if he be nonsuited by the defendant's not confessing according to the consent rule (e).*

But in all cases of ejectment by *landlord* against *tenant*, if the defendant do not appear at the trial, and confess lease, entry, and ouster, then upon proof that such defendant or his attorney was regularly

(s) Bul. N. P. 98. See the form of *postea* in this case, Chit. Forms, 464.

(t) Bul. N. P. 98; *Claxmore v. Searle*, 1 Ld. Raym. 729. See *Greeves v. Rolls*, 2 Salk. 456.

(u) See the form of *postea* in this case, Chit. Forms, 465.

(w) See form of certificate, Chit. Forms, 463.

(x) The 1 W. 4, sess. 2, c. 7, noticed *ante*, Vol. 1, p. 317, *post*, 553, has other provisions of a similar nature relative to other actions, and they seem cumulative.

(y) *Doe Williamson v. Dawson*, 4 C.

& P. 589, *post*, 553, *ante*, Vol. 1, p. 316; and see form of affidavit, Chit. Sum. Prac. 374; Chit. Forms, 463.

(z) *Doe Lord Palmerston v. Copeland*, 2 T. R. 779; *ante*, Vol. 1, 317, 318.

(a) *Doe Davis v. Williams*, 2 D. & R. 229, 1 B. & C. 118, S. C.

(b) See Chit. Forms, 468, 447, 448, 449. (c) *Goodright v. Vice*, Barnes, 182; *Doe Prior v. Salter*, 3 Taunt. 485. See *Thrustout v. Bedwell*, 2 Wils. 7.

(d) See the forms, Chit. Forms, 468, 469.

(e) *Run. Eject.* 415; *post*, 550.

served with notice of trial, the plaintiff shall not be nonsuit; but the production of the consent rule shall in all such cases be sufficient evidence of the lease, entry, and ouster. (1 G. 4, c. 87, s. 2, *post*, 567).

The plaintiff is not restricted in his proof to the number of acres, &c., or quantity of estate set forth in his declaration. Therefore, if he declare for 40 acres, he may recover 20; if he demand a moiety, he may recover a third (*f*). If the verdict be special, it should appear upon the face of it that the lessor of plaintiff had a right of entry at the time he commenced his ejectment (*g*).

In ordinary cases of ejectment, the damages given are merely nominal; the damages actually sustained by the detention of the property, &c., being usually recovered in an action of trespass for mesne profits. (*Vol. 1, p. 308*). But in ejectment by landlord against tenant, whether the defendant appear at the trial or not, the plaintiff, after proof of his right to recover possession of the whole or any part of the premises, may proceed to give evidence of the mesne profits thereof, which shall have accrued from the day of the determination of the tenant's interest, down to the time of the verdict, or to some preceding day to be specially mentioned therein; and the jury shall thereupon give their verdict, both as to the recovery of the premises, and as to the amount of the damages to be paid as mesne profits. (1 G. 4, c. 87, s. 2, *post*, 567). If the plaintiff wish also to recover the mesne profits, from the time of the verdict down to the time possession is delivered to him, he may afterwards proceed for it by action of trespass for mesne profits. (*Id.*). In an ejectment for the recovery of premises conveyed for the purposes of the 1 & 2 W. 4, c. 38, (the recent act for the building of additional churches), the jury who try the ejectment, or the jury under a writ of inquiry, are to ascertain the value of the premises, &c. (s. 18).

If, at the trial of an ejectment, the landlord against tenant, the plaintiff obtain a verdict, and it appear to the Judge that the finding of the jury is contrary to evidence, or that the damages given are excessive, he may order the judgment to be stayed until the fifth day of the next term, provided the defendant forthwith undertake to find, and on condition that within four days from the trial he shall actually find, security by the recognizance of himself and two sufficient sureties, in such reasonable sum as the Judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made, (if any), upon the premises, and which may happen to be thereupon, from the day of the verdict to the day on which execution shall finally be made upon the judgment, or the same be set aside. (1 G. 4, c. 87, s. 3, *post*, 567). This recognizance, however, shall stand discharged, in case the defendant shall bring a writ of error, and put in bail in error. (*Id.*).

(*f*) *Denn v. Burges v. Purvis*, 1 Bur. 326.

(*g*) See *Taylor v. Horde*, 1 Bur. 60-74; *Chaman v. Brown*, 3 Bur. 1626; *Brough-*

*ton v. Langley*, 3 Ld. Raym. 154; *Thornby v. Fleckwood*, 1 Str. 318; *Holdfast v. Dousing*, 2 Id. 1253.

*Costs.*] The prevailing party is entitled to costs in nearly the same cases as in personal actions. If no person appear to the ejectment, and judgment be consequently entered against the casual ejector, the plaintiff has no other remedy for his costs, than by his action for *mesne* profits, noticed hereafter, in which they are recoverable against the tenant as consequential damages (*n*). If there be several defendants, and the plaintiff have a verdict, each of them is liable for the entire costs, even although they defend severally (*o*). If several defend jointly, and succeed, they shall be entitled to costs; but the plaintiff may pay the costs to which of them he pleases (*p*); if they defend severally, they are entitled to costs if they succeed, in the same manner as in other cases. (8 & 9 W. 3, c. 11, s. 1, see 3 & 4 W. 4, c. 42, s. 32). So, if the plaintiff be nonsuit on the merits, the defendant is entitled to costs; (4 J. 1, c. 3); but where he is nonsuit, because the defendant has not confessed lease, entry, and ouster, we have seen (*ante*, 547) that, so far from being liable to costs, he is entitled to them from the defendant, according to the terms of the consent rule. The defendant is entitled to costs on a *nonpros* for the plaintiff's not replying when the lessor of the plaintiff has joined in the consent rule, or for not entering the issue, or proceeding to trial according to notice, or on a judgment as in case of a nonsuit (*q*).

If the plaintiff have a verdict, he recovers his costs against the defendant by a writ of execution, or by action, as in ordinary cases; but if entitled to costs under the consent rule, upon his being nonsuit, as is above mentioned, the only way of recovering them is by attachment, as directed *ante*, 541. If the defendant be entitled to costs, either upon verdict or where the plaintiff is *nonprossed* or nonsuit, his only remedy is by attachment; for the lessor of the plaintiff not being a party to the record, he cannot have a writ of execution against him, but must proceed upon the consent rule only. The usual mode is, to tax costs upon the *postea*, as in other cases, and sue out a *ca. sa.* against the nominal plaintiff for the amount of them; make copies of the rule, *allocatur* and *ca. sa.* and serve them on the lessor of plaintiff, at the same time shewing them the originals, and demanding the costs; and if he do not pay them, move the Court, upon an affidavit of the demand and refusal (*s*), for an attachment against him (*t*). Suing out a *ca. sa.* against the nominal plaintiff, however, seems an absurd and unnecessary proceeding, and may, I think, be omitted; and the defendant may at once proceed on the consent rule, in the manner directed *ante*, 548, as to the plaintiff's proceeding for costs upon a nonsuit (*u*).

In some cases, if a mere nominal or pauper defendant be put in by the landlord or other person, for the purpose of trying the latter's

(*n*) *Morris v. Barry*, 1 Wils. 1, 2 Str. 1180, S. C.; *Symonds v. Page*, 1 C. & J. 29.

(*o*) Bul. N. P. 335, 336.

(*p*) *Jordan v. Harper*, 1 Str. 516; *Dutby v. Tito*, 2 Id. 1203.

(*q*) See *Tidd*, Sup. 189; *ante*, 541.

(*s*) See the form, Chit. Forms, 469.

(*t*) *Runn. Eject.* 416.

(*u*) *Doe Prior v. Salter*, 3 Taunt. 485.

right and evading the costs, the Court will make such landlord or other person answerable for the costs. (*Ante*, 544). So, on the other hand, if a stranger carry on a suit in another name, who has title, and yet is so poor that he cannot pay the costs; in case he fail, the Court, on affidavit of the circumstances, will order the person who carried on the suit to pay costs to the defendant (x). And see *As* to compelling security for costs in general, *ante*, 543, and *post*, Book 4, Part 1, c. 11.

Where the lessor of the plaintiff died between the commission day and the trial, and the plaintiff was nonsuit on the merits, it was holden that the executor of the lessor was not liable for the costs of the nonsuit (y). Where husband and wife were lessors, and the former died after entering into the rule, the wife was, notwithstanding, held liable for the costs; because they were to be paid by the lessor of the plaintiff, and both of them were such (z). ••

*Judgment.*] If a verdict have been given, let the prevailing party get the record of Nisi Prius from the associate, and, in town causes, indorse the *postea* on it, as directed Vol. 1, 314. (See the references to the forms, *infra*). If the verdict be not set aside, or the judgment arrested within the time allowed for that purpose, (see Vol. 1, p. 317, 318), then, if the verdict be for plaintiff, proceed to tax costs and sign final judgment, as directed Vol. 1, 318. If the verdict be for the defendant, costs are taxed upon the consent rule, as mentioned, *ante*, 550 (a).

It may be as well observed, that if the Judge who tried the cause certifies only, under the 1 W. 4, c. 70, s. 38, (*post*, 553), that a writ of possession ought to issue immediately, and such writ be issued accordingly, the costs are taxed, and the judgment is, in general, signed and executed afterwards at the usual time, as if no such writ issued. The 1 W. 4, sess. 2, c. 7, however, (which, by sect. 5, does not destroy the above provision of the 1 W. 4, c. 70), allows the Judge who tried the cause to certify, on the back of the record, before the end of the sittings or assizes, that execution ought to issue forthwith, or at some future day, and subject or not to any qualification or condition; and if the Judge certifies under this act, the costs may be taxed, and judgment signed forthwith, and execution may be issued forthwith or afterwards, according to the certificate, on any day in vacation or term;

(x) Run. Eject. 417.

(y) *Doe Payne v. Grundy*, 2 D. & R. 437, 1 B. & C. 284, S. C.

(z) *Harr. L. & T.* 865.

(a) See also, upon this subject, *Worral v. Bent*, 2 Str. 835; *Fisher v. Hughes*, Id. 908; *Morres v. Barry*, Id. 1180; *Fur v. Denn*, 1 Bur. 362; *Deckrow v. Jenkins*, Cro. Car. 178; *Taylor v. Wilbore*, Cro. El. 768; Co. Lit. 285; *England v. Slade*, 4 T. R. 683; *Lindsey v. Clerke*, 5 Mod. 285. See the form of *postea*, upon a nonsuit, for defendant's not confessing lease, entry, and ouster, Chit. Forms, 464; and of judgment against casual ejector and writ of possession,

in such a case, Id. 448, 449; of *postea* and judgment, &c., upon a nonsuit for any other cause, Id. 471, 472; of *postea* and judgment, &c., upon verdict for defendant, Id. 466, 468; of *postea* for plaintiff, Id. 464; and judgment thereon, Id. 466; of *postea* where jury find against one defendant, and for another by reason of his not confessing lease, entry, and ouster, Id. 465; and judgment thereon, Id. 567; of *postea* where a moiety only is recovered, Id. 464; and judgment thereon, Id. 466; of *postea* where part is found for plaintiff and part for defendant, 465; and of judgment thereon, Id. 467.

and the *postea*, with such certificate as a part thereof, must be entered of record as of the day on which the judgment was signed; but that the party entitled to such judgment may if he chooses postpone signing it. (*See Vol. 1, 315, 316*).

*Error.*] The proceedings upon a writ of error on a judgment in ejectment are the same (with one or two exceptions) as in other cases. Bail is required where the defendant brings a writ of error after verdict for the plaintiff (16 & 17 C. 2, c. 8, s. 3); and the recognizance is taken for the amount of double the yearly value, and double the costs of the ejectment (*b*). It is not necessary that the plaintiff in error should join in the recognizance; or, if he do, he cannot be examined as to his sufficiency (*c*).

As the casual ejector cannot bring error, being a mere nominal person, that writ can only be brought after the defendant has appeared and confessed lease, entry, and ouster (*d*): even if the landlord be permitted to defend, a writ of error cannot issue in the name of the casual ejector. But on a writ of error from an inferior court, in the name of the casual ejector, the Court will not order a *nonpros* to be entered, though his release of errors be shewn, because inferior courts are not competent to proceed by the consent rule (*e*).

The death of the nominal plaintiff cannot be assigned for error (*f*); nor can a defendant in ejectment assign for error, that, being an infant, he appeared by attorney. (*Ante, Vol. 1, 329*) (*g*). And it seems, that nothing can be assigned for error, that would make it necessary to go again into the title of the premises (*h*).

When the plaintiff obtains judgment, and the defendant brings a writ of error, the plaintiff cannot sue out execution until the writ of error be determined (*i*); provided bail in error be put in and perfected, when necessary, within the time limited for that purpose. But where the defendant below, pending a writ of error brought by him, brought a new ejectment to recover the same premises, the Court would not allow him to proceed in the new action until he quitted possession, or the tenants had attorned to the lessor of the plaintiff in the former action (*k*). Also, where a defendant brought a writ of error, the Court obliged him to enter into a rule not to commit waste pending the writ (*l*). And by 16 & 17 C. 2, c. 8, s. 4, if

(b) *Keene Byron v. Deardon*, 8 East, 298; *Thomas v. Goodtitle*, 4 Bur. 2501.

(c) *Keene v. Deardon*, 8 East, 298. By the 6 G. 4, c. 96, s. 1, bail in error is now requisite in all *personal* actions, after judgment by default or on demurrer, as well as after verdict, unless the Court or a Judge will by special order dispense with the same; which they will not do unless substantial ground of error be shewn. (*Wadsworth v. Gibson*, 4 Bing. 572, 1 M. & P. 501, S. C.) But an ejectment being a *mixed* and not a *personal* action, does not, it

seems, come within this enactment.

(d) 2 Sellon, 205; *George v. Wisdom*, 2 Bur. 757.

(e) *Run. Eject.* 421.

(f) *Moore v. Goodright*, 2 Str. 899.

(g) See form of assignment of error in ejectment and joinder, 10 Went. 1, 3.

(h) *Wilkes v. Jordan*, Hobart, 5.

(i) *Jones v. Edwards*, 2 Str. 1241.

(k) *Fenwick v. Grosvenor*, 1 Salk. 258.

(l) *Wharod v. Smart*, 3 Bur. 1823; Vol. 1, p. 357.

upon error brought the judgment be affirmed, or the plaintiff discontinue or be nonsuit, the Court, from which execution should issue, shall award a writ to inquire as well of the *mesne* profits, as of the damages by any waste committed after the first judgment in the ejectment; and upon the return thereof, judgment shall be given and execution awarded for such *mesne* profits and damages, and also for costs of suit. The bail in error also are made liable for these *mesne* profits, damages, and costs; (*Id.* s. 3); but no action can be brought for them against the bail, until their amount have been first ascertained upon a writ of inquiry, as above directed (*m*).

*Execution.*] Formerly, the execution could not, in any case, issue out of this Court until final judgment was obtained; but now, if the Judge, who tried the cause, shall think fit to *certify* that *possession* should be *immediately* obtained, a writ ~~may~~ issue accordingly. This is provided for by the 1 W. 4, c. 70, s. 38, which enacts, "that, when a verdict is given for plaintiff, or he is nonsuited for want of defendant's not confessing lease, entry, or ouster, the Judge, before whom the cause was tried, may certify (*n*) his opinion on the back of the record, that a writ of *possession* ought to issue *immediately*, and, upon such certificate, a writ of possession (*o*) may be issued forthwith; and the costs may be taxed, and judgment signed and executed afterwards, at the usual time, as if no such writ had issued: provided, that such writ, instead of reciting a recovery by judgment, in the form now in use, shall recite shortly that the cause came on for trial at *Nisi Prius*, at such a time and place, and before such a Judge (naming the time, place, and Judge), and, that thereupon the said Judge certified his opinion, that a writ of possession ought to issue immediately." If the lessor of the plaintiff be *nonsuited* for want of the defendant's confessing lease, entry, and ouster, the Judge will not, it seems, grant a certificate under this statute to give immediate possession, unless an affidavit, stating the circumstances of the case, be laid before him. And, *per Taunton, J.*, "Under this act of parliament, there does not appear to be any *discretion* in the Judge, as to the time when the possession shall be delivered: we must either grant a certificate to enable the lessor of the plaintiff to get into *immediate* possession, or the case must take its regular course" (*p*). This statute, it will be observed, empowers the Judge only to certify, that a *writ of possession* may be issued immediately, but does not allow of such certificate as to a writ of execution for the *costs* or damages, (if any); and, unless the Judge certifies under the 1 W. 4, sess. 2, c. 7, s. 2, noticed *ante*, Vol. 1, 315, 373, as it seems he may do, that execution

(*m*) *Doe v. Reynolds*, 1 M. & Sel. 247.

(*n*) See form, Chit. Forms, 463.

(*o*) See form of writ, Chit. Forms, 472.

(*p*) *Doe d. Williamson v. Dawson*, 4 C. & P. 589; *sed quare* if such certificate might not be granted under the 1 W. 4, sess. 2, c. 7, s. 2, *ante*, Vol. 1, p.

315, for the execution, at any time, the provisions of such act being, as it seems, cumulative. See form of certificate, Chit. Forms, 463; and see *Id.* for a form of the affidavit to procure it. See also a form of certificate under the 1 W. 4, sess. 2, c. 7, *Id.* 188.

ought to issue for them, the party must wait the ordinary and regular time before issuing it. If the Judge does not grant his certificate, allowing the issuing of a writ of possession, then it cannot be issued until final judgment is signed in the ordinary course (q).

The plaintiff may have a separate writ of *fi. fa.* or *ca. sa.* for the costs (r); or he may have the *fi. fa.* or *ca. sa.* added to the *habere facias possessionem* in the same writ (s). If this writ be not executed, then, upon the return of it, you may sue out an *alias*, &c. (t). But, if possession be once given under it, the plaintiff cannot sue out another writ of possession, although he be disturbed in his possession by the same defendant, and although the sheriff have not yet returned the writ (u). In such a case, however, it is probable that the Court, upon application, would punish the defendant by attachment (x).

The defendant, we may recollect, cannot have a writ of execution for his costs, if he have a verdict, or the plaintiff be *nonprossed* or nonsuit; but must proceed upon the consent rule by attachment. (*Ante*, 550).

After verdict and judgment, where the landlord defends, execution may be issued against him without any further order of the Court; but, when the landlord is admitted to defend, and judgment is entered against the casual ejector, with a stay of execution until a further order, the lessor, before he takes out execution, must move the Court for leave to do so, and the rule is not absolute in the first instance. (*Ante*, 542). In such case, a writ of error brought by the landlord may be shewn for cause, and will be a sufficient reason against taking out execution; but, if the landlord omit the opportunity of shewing it for cause, the execution is regular, and cannot be set aside (y).

In order to sue out the writ, *engross it on parchment; get it sealed; pay 7d.; at the time you get the writ sealed, you must produce to the sealer of the writs the postea and judgment paper; (R. H. 2 W. 4, r. 75; R. H. 2 & 3 G. 4); and the Judge's certificate for immediate execution, if any. There is no occasion for any præcipe for the writ, (R. H. 2 W. 4, r. 76), nor need it be signed. (Id. r. 75). Leave the writ at the sheriff's office, and get a warrant on it; pay 2s. 6d.; give the warrant to the officer, and he will execute the writ, by putting the lessor of the plaintiff, or some person on his behalf, into possession, upon the premises being shewn to him. The legal fiction of relation to the teste of the writ is to be supported in the maintenance of a writ of *habere facias possessionem* (z). Therefore, if tested on the last day of the preceding term, it may be sued out*

(q) See forms of a writ upon a single demise, Chit. Forms, 470, 472; upon a double demise, *Id.* 471, 473.

(r) See the forms, Chit. Forms, 474.

(s) See the form of writ of possession and *fi. fa.* for costs, in same writ, Chit. Forms, 474; the like, with *ca. sa.* for costs, *Id.* 475.

(t) Palm. 289.

(u) *Doe Pate v. Roe*, 1 Taunt. 55.

See *Kingsdale v. Mann*, 6 Mod. 27, 1 Salk. 321, S. C.

(x) See *Davies d. Povey v. Doe*, 2 W. Bla. 892.

(y) See *Doe Roberts v. Gibbs*, 1 Chit. Rep. 47; *Doe Simons v. Masters*, *Id.* 233.

(z) *Doe Beyer v. Roe*, 4 Bur. 1970. Query as to the effect of the 3 & 4 W. 4, c. 67, s. 2.

though the lessor of the plaintiff be since dead. In an ejectment against a *feme sole*, who married before trial, and a verdict and judgment were obtained against her by her original name, it was held, that it was not irregular to issue an *habere facias possessionem* and *fi. fa.* against her by the same name, though the *fi. fa.* was inoperative (a). The officer, if necessary, may break open doors, in order to execute an *habere facias possessionem*, if the possession be not quietly given up; or he may take the *posse comitatus* with him, if he fear violence (b). And, after he has got admission, he may remove all persons, goods, &c., from off the premises before he gives possession (c). If there be several tenements in the possession of several tenants, the officer must give possession of each separately; the delivery of the possession of one tenement, in the name of all, is not sufficient (d): but if the several tenements be in the possession of one tenant, and included in the same action, possession of one in the name of the whole will be sufficient. If he give possession of more than he ought, the Court afterwards, upon application, will order it to be restored (e). Thus, where an ejectment was brought by a tenant in common, to recover five-eighths of a cottage, and the sheriff, in execution of the writ of possession, turned the tenant in possession out of the cottage altogether; the Court, upon application, granted a rule upon the sheriff and the lessor of the plaintiff, requiring them to restore the tenant to the possession of three-eighths of the premises (f). Where, in ejectment by a landlord against his tenant, who had holden over, the crops upon the lands, when seized under the writ of possession, were more than sufficient to pay the arrears of rent, &c.; yet the Court of Common Pleas refused to order the landlord to pay over the surplus to the tenant (g). It is the practice for the lessor of the plaintiff to give the sheriff security, to indemnify him from the defendant, and then for the sheriff to give the lessor execution for what he demands (h).

If the yearly value of the premises do not exceed 100*l.*, the sheriff is entitled to a poundage of 12*d.* in every 20*s.*; but, if it exceed 100*l.*, then to 6*d.* for every 20*s.* above that sum (3 *G. 1*, c. 15, s. 16, see *ante*, Vol. 1, 387).

The tenant or tenants in possession, however, in order to save the expense of executing a writ of possession, may attorn to the lessor of the plaintiff (i). Let this attornment be written upon unstamped paper, and signed by the tenants in the presence of a witness.

It should also be observed, that the plaintiff having judgment to recover his term, may, if he can do so without force, enter without suing forth a writ of possession; for, where the land recovered is cer-

(a) *Doe Taggart v. Butcher*, 3 M. & Sel. 557.

(b) 5 Co. 91 b, Vol. 1, p. 384.

(c) 1 Lev. 145.

(d) 2 Ro. Abr. 180; 2 Sellon, 203.

(e) *Connor v. West*, 5 Bur. 2673; Run. Eject. 432.

(f) *Doe Saul v. Dawson*, 3 Wils. 49.

(g) *Doe Upton v. Witherwick*, 3 Bing. 11, 10 Moore, 267, S. C.

(h) Run. Eject. 434; Harr. L. & T. 867.

(i) See form of attornment, Chit. Forms, 477.



tain, the recoverer may, without force, enter at his own peril; and the assistance of the sheriff is only to preserve peace (*k*).

As to setting aside, or staying the proceedings before or after execution, see *ante*.

*Restitution.*] In some cases, a writ of restitution may be awarded—as where a judgment, irregularly obtained, was set aside, and the possession, that had been given upon the execution, ordered to be restored, but, from the lessor of the plaintiff, who held the possession, having absconded, the rule became ineffectual—a writ of restitution was awarded (*l*).

*Scire facias.*] If the plaintiff neglect to sue out his execution for a year and a day, after judgment, he must, in general, revive the judgment, as in other cases, else the Court will award a restitution *quia erroneè emanavit* (*m*). If the plaintiff, where he is a *real person*, die within a year and a day, his executors cannot take out execution without a *scire facias*, for they are not parties to the judgment; though, if execution has been regularly issued out in the lifetime of the testator, the sheriff may execute it after his death; because the authority is from the Court, and not from the party (*n*). If, after judgment, and before execution, the defendant in ejectment dies, and a *scire facias* goes, it must be against the terretenants of the land, and not against the executor, without naming him terretenant (*o*).

## SECT. 2.

### *Proceedings in Ejectment, upon a vacant Possession.*

We have already observed, that where a person has a right of entry, he may, if the premises be unoccupied and vacant, in a peaceable manner, and without using such force as would amount to a forcible entry, enter and take possession of them without bringing an ejectment; though, in most cases, it is best to proceed by ejectment. (*Ante*, 529).

Where there is no tenant upon the premises, as observed in a late valuable work (*p*), a distinction must be taken between cases where the tenant has actually *abandoned* the possession, and where, although he has *discontinued to occupy* the premises, he has still retained the virtual possession of them. In the former case, the landlord must proceed in the ejectment, as upon a vacant possession: in the latter

(*k*) Run. Eject. 424; 2 Sellon, 202;  
*ante*, 529.

(*l*) 2 Sellon, P. 204; Harr. L. & T.  
868. See form, Chit. Forms, 225.

(*m*) *Post*, Chap. 3; Harr. L. & T.  
868. See the form, Chit. Forms, 225.

(*n*) Run. Eject. 429; Harr. L. & T.  
869.

(*o*) 2 Sellon, 204.

(*p*) Mr. Harrison's edition of Woodfall's Law of Landlord & Tenant, 827.

case, he must proceed in the ordinary way, after having effected the best service of the declaration in his power. Nice distinctions are drawn as to what is a *vacant* possession. Where the tenant of a house locked it up, and quitted it, it was held, that the landlord should treat it as a vacant possession (*q*). Where the lessee of a public-house took another, and removed his goods and family, but left beer in the cellar, it was held, that a proceeding as on a vacant possession was incorrect, because the lessee still continued in possession; and a case was mentioned, where leaving hay in a barn was held to be keeping possession: it, however, appeared in the latter case, that the attorney for the plaintiff knew whither the lessee had removed, and might have served him personally, which could not be done on the premises. In the case of land, to which there is no house or barn, being rented, if it be known where the tenant lives, he must be served (*r*). Where a servant of the deceased tenant remains in possession, the plaintiff ought to endeavour to get possession; and, if he resists, such servant may be treated as tenant, and the declaration may be served on him as such; and, if he does not resist, it seems that the lessor may treat it as a vacant possession (*s*). Service on the executors of the late tenant in possession is bad, if it does not appear that they were the tenants in possession (*t*). A labourer, who does not pay rent, has been held to be an occupier, on whom service of an ejectment is good (*u*). Where the premises consisted of a mansion, and four small houses in a yard, surrounded by a wall, through which was a door to them, forming the only means of access, in one of which small houses resided a man, who was permitted to live there merely to take care of them and the mansion-house, the rest of the messuages being vacant, the Court refused a motion to make service on him good, and recommended the plaintiff to affix a declaration on the empty houses, and then to move that it should be deemed good service (*x*).

The plaintiff in an ejectment on a vacant possession should, in general, be more strict in his proceedings than in a contested possession (*z*).

*Entry, lease, ouster, &c.*] In order to maintain ejectment on a vacant possession, (as to what is, see *supra*), an actual entry must first be made upon some part of the premises in question. This must be done either by the lessor of the plaintiff himself, or by some person authorized by him for that purpose by a letter of attorney (*a*). A

(*q*) *Doe d. Darlington (Lord) v. Cock*, 4 B. & Cres. 259; Harr. L. & T. 827.

(*r*) *Savage v. Dent*, 2 Str. 1064.

(*s*) *Doe d. Atkins v. Roe*, 2 Chit. 179.

(*t*) *Doe d. Paul v. Hurst*, 1 Chit. 162.

(*u*) *Gulliver v. Smith*, 2 Ld. Ken. 511.

(*x*) 1 Tidd's Prac. 443. See the above cases collected in Harr. L. & T. 827.

(*z*) See *Anon.* 2 Chit. Rep. 188. In

that case, the plaintiff having obtained judgment, neglected to take away the rule until after two days after the term in which the judgment was obtained; and the Court refused to assist him in the next term.

(*a*) See form of letter of attorney, Chit. Forms, 478; and of affidavit of execution of, *Id.*

subsequent authority, by a letter of attorney, would, it seems, suffice (b).

When the lessor, or his attorney, goes for the purpose of making the entry, he should be accompanied by two friends; and, having made the entry upon the premises, let him there execute a lease of them (previously prepared) to one of his friends, and put him immediately in possession; the other friend is then to enter upon the premises, and thrust the lessee out; whereupon, this second lessee, the ejector, is immediately served with a declaration in ejectment (also previously prepared), in which he is made defendant, and the other friend plaintiff. All this should be done before the first day of the term; otherwise, you cannot move for judgment that term (c). It may be necessary to mention, that an attorney cannot be the lessee in this case (d).

If the premises in question be a house, merely, and the door be locked; in such a case, getting upon the threshold of the door, and putting his finger into the key-hole, will, it seems, be a sufficient entry, upon the part of the lessor or his attorney, if none better can be made without force.

*Judgment.*] In this action of ejectment upon a vacant possession, no person claiming title can be let in to defend, but he that can first seal a lease upon the premises must obtain possession (e); and persons having any claim or title to them must have recourse to their action. Consequently, the lessor of the plaintiff may immediately proceed to judgment against the defendant. For this purpose, *make affidavit of the entry, lease, and ouster, and of the service of the declaration and notice (f); annex to it the letter of attorney, the lease, and a copy of the declaration and notice; and let the affidavit be sworn before a Judge or a commissioner. Indorse it, "to move for judgment against the defendant," and get it signed by counsel; draw up the rule, and proceed to sign judgment as directed ante, 537; then sue out execution (g). If the lease were executed by power of attorney, there must also be an affidavit of the execution of such power (h).*

See stat. 11 G. 2, c. 19, s. 16, and 57 G. 3, c. 52, which give a power to two justices of peace, when premises are deserted by a tenant, and no sufficient distress is to be found upon them to answer the arrears of rent, to give possession of them to the landlord (i).

(b) See Co. Lit. 245. a., 248 a.; *Fitchet v. Adams*, 2 Str. 1128; *Maclean v. Dunn*, 1 M. & P. 770, 4 Bing. 722, S. C.

(c) See form of lease, Chit. Forms, 478; of declaration and notice to appear, Id. 479.

(d) R. M. 1654, s. 1; *Hawkins v. Magnell*, 2 Doug. 466, Vol. 1, p. 32.

(e) Bul. N. P. 95.

(f) See form, Chit. Forms, 479.

(g) See form, Chit. Forms, 480.

(h) See the form, Chit. Forms, 478; see as to the form of rule for judgment against defendant, Id. 480; of the *præcipe* for appearance, Id.; of the judgment, and of the writ of possession, Id.

(i) See *Exp. Pilton*, 1 B. & Ald. 369; *Basten v. Carew*, 5 D. & R. 558, 3 B. & Cres. 649, S. C.; *Lister v. Brown*, 3 D. & R. 501, 1 C. & P. 121, S. C.

## SECT. 3.

*Proceedings in Ejectment for Nonpayment of Rent.*

1. *Where there is sufficient Distress upon the Premises.*
2. *Where there is not sufficient Distress upon the Premises.*

1. *Where there is sufficient Distress upon the Premises.*

If the tenant forfeit his term by the nonpayment of rent, the landlord may proceed to recover possession of the premises by ejectment (*j*). The mode of proceeding, however, varies, according as there is or is not a sufficient distress upon the premises to answer the amount of the rent due: if there be not a sufficient distress upon the premises, the proceeding may be under stat. 4 G. 2, c. 28, s. 2; if there be a sufficient distress, the proceeding must be at common law (*k*). The proceeding at common law shall be first considered.

Before you commence the action, and, indeed, before the forfeiture can be incurred, a demand must have been made of the rent (*l*); unless there be an express stipulation or agreement between the parties dispensing with such demand (*m*). There is a great strict-

ness required in this respect; for the common law does not favour forfeitures. The demand must be made, in fact, although no person be present on the part of the tenant to answer (*n*). The landlord must go in person, or execute a formal power to another, who must go in person (*o*). If the lease do not specify where the rent is to be paid, the demand must be made upon the land, and at the most notorious place of it; and, therefore, if there be a dwelling-house upon the land, the demand must be made at the front door of it; but it is not necessary to enter the house. Yet if the tenant were to meet the lessor on or off the land, at any time on the last day given him to pay the rent, and then tender him the rent, it would be sufficient to save the forfeiture (*p*). If the lease, however, specify a place for the payment of the rent, the demand must be made at that and no other (*q*). Also, the demand must be made precisely on the last day on which it can be paid to save the forfeiture; as where the proviso in the lease is, that if the rent be behind, and unpaid for the space of twenty days, the lessor may re-enter, the demand must be made on the twentieth day, at some convenient time, usually half an hour be-

(j) He may also, as we have seen *ante*, 529, obtain possession without an ejectment, if the premises be vacant, &c.

(k) *Doe Forster v. Wandlass*, 7 T. R. 117; *Doe Chandless v. Robson*, 2 C. & P. 245.

(l) Bro. Abr. Demaunde, pl. 19.

(m) *Doe Harris v. Masters*, 2 B. & C.

490, 4 D. & R. 45, S. C.; *Goodright v. Cator*, 2 Dougl. 486.

(n) Plowd. 70 a, b.

(o) *Doe West v. Davis*, 7 East, 363.

(p) Co. Lit. 201 b, 202 a; *Doe Forster v. Wandlass*, 7 T. R. 117; *Duppa v. Mayo*, 1 Saund. 287.

(q) Co. Lit. 202. a.

fore sunset (*r*): a demand at one o'clock in the day will not do (*s*). And, lastly, the demand must be made of the precise sum due, and not a penny more or less (*t*). Where the rent was payable quarterly, and more than one quarter was due, it was held, that only a quarter's rent should be demanded (*u*). If the rent be not paid when thus demanded, the tenant forfeits his term, and the landlord may re-enter for the forfeiture: that is, he may bring an ejectment to recover the possession of the premises; for an actual entry is not necessary in this case (*w*).

The proceedings in this ejectment are the same as in ordinary cases, as described in the last two sections, according as the tenant is in possession, or the possession is vacant.

This mode of proceeding upon a forfeiture for non-payment of rent, when there is a sufficient distress upon the premises, is seldom, however, adopted in practice: first, on account of the great nicety to be observed in the previous demand of the rent; and, secondly, because the tenant, by filing a bill in equity, may obtain an injunction, and stay the proceedings, upon payment of the rent in arrear.

## 2. *When there is not sufficient Distress upon the Premises.*

If a term be forfeited by the non-payment of rent, and there be not sufficient distress upon the premises (*x*), the proceedings in an ejectment by the landlord for the recovery of the possession in such a case are regulated by stat. 4 G. 2, c. 28; by which it is enacted, that "in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof (*i.e.* where, by the express terms of the lease, a right of re-entry has been reserved (*y*)), such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises, and recover therein, provided no sufficient distress was to be found on the premises to countervail the arrears of rent; and unless the tenant pay the rent and costs within six calendar months, he is to be deprived of all relief at law or equity, and the tenancy is absolutely determined." (*s. 2*). Although the lease expressly requires a lawful demand, no demand is necessary to proceed under this act; the service of the declaration is substituted for such demand (*z*).

Before proceeding under this act you must make diligent search over the premises, after the expiration of the time limited for pay-

(*r*) Co. Lit. 202. a., and note 3; Plowd. 172 b; *Duppa v. Mayo*, 1 Saund. 287.

(*s*) *Doe Wheeldon v. Paul*, 3 C. & P. 618.

(*t*) 1 Leon. 305; *Fabian v. Winston*, Cro. El. 209.

(*u*) *Doe Wheeldon v. Paul*, 3 C. & P. 613.

(*w*) *Anon.* 1 Vent. 248; *Little v. Heaton*, 2 Ld. Raym. 750, 1 Salk. 259, S.C.;

*Clerke v. Pywell*, 1 Saund. 319; *Duppa v. Mayo*, Id. 287.

(*x*) *Doe Forster v. Wandlass*, 7 T. R. 117; *Doe Chandless v. Robson*, 2 C. & P. 245.

(*y*) *Woodf. L. & T* 2 ed. 523; Chit. Col. Stat. 673, (n. k).

(*z*) *Doe Schufield v. Alexander*, 2 M. & Sel. 525; *Doe Lawrence v. Shawcross*, 3 B. & Cres. 752, 5 D. & R. 711, S. C.

ment of the rent, to ascertain the insufficiency of the property there to answer distress, and you will have to prove such search at the trial (a). But if the tenant prevented the search, that would supersede the necessity for it (b).

*Declaration and service of.*] The declaration is the same as in ordinary cases. The demise must be laid on a day when the forfeiture was complete, and on or after a day when it is certain there was not sufficient property to distrain upon (c). If the possession be vacant, the notice is signed by the plaintiff's attorney, and directed to the tenant late in possession (d). If the tenant be in the occupation of the premises, the declaration and notice are served in the same manner as directed *ante*, 531 to 534. But if "the same cannot be legally served, or no tenant be in actual possession of the premises, then the same may be affixed upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments, comprised in such declaration in ejectment, and such affixing shall be deemed legal service thereof; which service, or affixing such declaration, shall stand in the place and stead of a demand and re-entry." (4 G. 2, c. 28, s. 2).

*Judgment against casual ejector.*] If the tenant take no steps to have himself made a party to the suit, the plaintiff may then proceed to obtain judgment against the casual ejector, as in ordinary cases. In order to this, *Let an affidavit (e) be made of the service or affixing of the declaration and notice, and also stating that "half a year's rent was due before the declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor or lessors had power to re-enter"* (4 G. 2. c. 28, s. 2). *Annex this affidavit to the declaration, move upon it for judgment against the casual ejector, draw up the rule, and sign judgment, as directed ante*, 536. Which judgment shall have the same effect, and the plaintiff may thereon sue out execution in the same manner, "as if the rent had been legally demanded, and a re-entry made." (4 G. 2, c. 28, s. 2).

*Appearance, &c.*] The appearance, plea, and other proceedings to trial, &c., are the same as already mentioned in the first section. At the trial, however, the plaintiff, in addition to what in other cases he would have to give in evidence, must prove "that half a year's rent

(a) See *Doe Forster v. Wandlass*, 7 T. R. 117; *Rees v. King*, Forrester Rep. 19.

(b) *Doe Chippendale v. Dyson*, 1 M. & M. 77.

(c) *Doe v. Fuchau*, 15 East, 286; *Doe Lawrence v. Shawcross*, 3 B. & Cress. 752, 5 D. & R. 711, S. C.

(d) See form of declaration and notice, where the premises are tenanted,

Chit. Forms, 490; and of affidavit of service thereof, *Id.*; of declaration and notice upon a vacant possession, *Id.* 481; and of affidavit of service thereof, *Id.*

(e) The act requires this affidavit. After judgment and execution it will be presumed that the affidavit was made; see *Doe v. Lewis*, 1 Bur. 614.

was due before the declaration was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter." (4 G. 2, c. 28, s. 2) (f).

We have seen that, at the trial, the plaintiff, on proving the mesne profits, may recover them as damages. (*Ante*, 549, *post*, 567).

*Tender of rent; bill in equity, &c.*] If the tenant or his assigns (g) shall, at any time before the trial (h), pay or tender to the landlord, his executors, &c., or pay into Court, all the rent in arrear, together with costs, all further proceedings shall cease. (4 G. 2, c. 28, s. 4). The application may be to the Court in term time, or to a Judge in vacation (i). By consent, the Court or a Judge will, even after execution executed, stay the proceedings, &c., on payment of the rent and costs (k). The rent to be paid must, it seems, be calculated only to the last rent day, not to the day of computing (l). The application may be made though the ejectment be not wholly brought under the act; and in such case the Court will grant it, reserving, however, to plaintiff the liberty of proceeding on any other title (m). Where the lessors of the plaintiff were both devisees and executors, and in each capacity rent was due to them; and the defendant moved to stay the proceedings, on payment of the rent due to the lessors of the plaintiff as devisees, they not being entitled to bring an ejectment as executors; and there appearing to be a mutual debt due to the defendant by simple contract, the defendant offered to go into the whole account, taking in demands both as devisees and executors, having just allowances; which the lessors of the plaintiff refused: the rule was made absolute to stay the proceedings, on payment of the rent due to the lessors as devisees, and costs (n). Where the rent was tendered before notice of the action, the proceedings were set aside for irregularity; and the landlord having given directions respecting the matter to his attorney, was held to amount to nothing (o).

Or the defendant may apply to a Court of equity for relief, either before or after trial.

But "in case the lessee, his assignee, or other person claiming or deriving under the said lease, shall suffer judgment to be recovered on such ejectment, and execution to be executed thereon, without paying the rent in arrear together with full costs, and without filing any bill for relief in equity within six calendar months after such execution executed; then and in such case the said lessee, &c., shall be barred or foreclosed from all relief in law and equity (other than by writ of error, if the judgment be erroneous), and the landlord or les-

(f) See *Doe v. Lewis*, 1 Bur. 614, *ante*, 547.

(g) See *Doe Whitfield v. Roe*, 3 Taunt. 402; *Ad. Eject.* 214, S. C.

(h) See *Roe West v. Davis*, 7 East, 363; *Goodtitle v. Holdfast*, 2 Str. 900; *Doe Harris v. Masters*, 4 D. & R. 46, 2 B. & Cres. 490, S. C.

(i) Ca. Pr. C. B. 6; 2 Sellon, 127.

(k) Harr. L. & T. 844.

(l) *Doe Harcourt v. Roe*, 4 Taunt. 883.

(m) B. N. P. 97.

(n) 2 Sell. Prac. 211.

(o) *Goodright d. Stevenson v. Noright*, 2 W. Bl. 747.

sor shall thenceforth hold the said demised premises discharged from such lease." (4 G. 2, c. 28, s. 2) (p).

#### SECT. 4.

#### *Proceedings in Ejectment, under stat. 1 G. 4, c. 87, upon the Determination of a Tenancy.*

The mode of proceeding given by the stat. 1 G. 4, c. 87, may be adopted in all cases "where the term or interest of any tenant, holding, under a lease or agreement in *writing*, any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired, or been determined either by the landlord or tenant by regular notice to quit (*q*), and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made thereof." This act does not, it seems, extend to cases where the tenant *bona fide* disputes the landlord's title; as if the tenant claim the premises as heir at law or the like (*r*). A holding for three months certain is a tenancy for a term within the meaning of the act (*s*). So is a mere agreement in writing for a lease for a term certain, and a holding over beyond that term (*t*). But a tenancy for years determinable on lives is not (*u*); and the statute only applies where there was a term certain, or a tenancy from year to year, and not to the middle case of a term for fourteen years, determinable by notice at the end of the first seven, and determined by such notice accordingly (*x*). The holding must have been under a lease or agreement in writing; and, therefore, where a tenant held from year to year, under a letting by parol, it was holden not to be within the act (*y*).

A landlord, however, is not confined to the mode of proceeding given by this statute; but he may adopt it, or have recourse to the mode of proceeding laid down in the first section of this chapter, *ante*, 528, at his option. (See 1 G. 4, c. 87, s. 7). And the landlord should be cautious in proceeding under this act, and requiring bail; for if he fail in the action he will have to pay *double costs*. (1 G. 4, c. 87, s. 6, *post*, 568).

*Demand of possession.*] This demand must be in writing, and "made

(p) See *Doe Hitchins v. Lewis*, 1 Bur. 614, 2 Ld. Ken. 320, S. C.

(q) *Doe Cardigan v. Roe*, 1 D. & R. 540.

(r) *Doe Saunders v. Roe*, 1 Dowl. P. C. 4.

(s) *Doe Phillips v. Roe*, 5 B. & Ald. 766, 1 D. & R. 433, S. C.

(t) *Doe Marquis Anglesey v. Roe*, 2 D. & R. 565.

(u) *Doe Pemberton v. Roe*, 7 B. & Cres. 2.

(x) *Doe d. Cardigan v. Roe*, 1 D. & R. 540; *Doe d. Tindal v. Roe*, 1 Dowl. P. C. 143, 2 B. & Adol. 922, S. C.

(y) *Doe Bradford v. Roe*, 5 B. & Ald. 770; *Doe Sampson v. Roe*, 6 Moore, 54; *Rees v. Thrustout*, M'Clel. 492. See form of notice to quit, Chit. Forms, 437.



and signed by the landlord or his agent, and served personally upon, or left at the dwelling house or usual place of abode of, such tenant, or person" holding or claiming by or under him. (1 G. 4, c. 87, s. 1) (z). And if such tenant or person thereupon refuse to deliver up possession, the landlord may commence his ejectment. (See *Id.*).

*Declaration and notice.*] The declaration is in the usual form (see *ante*, 529) (a): but at the foot thereof, the landlord is to address a notice to such tenant or person (*vide supra*), requiring him to appear in the Court in which the action shall have been commenced, on the first day of the term then next following, there to be made defendant, and to enter into a recognizance by himself and two sufficient sureties, in such sum as to the Court shall seem reasonable, conditioned to pay the costs and damages which shall be recovered in the action, if the Court shall so order. (1 G. 4, c. 87, s. 1) (b). It must be signed by the landlord or his agent, and not in the name of Richard Roe, as in the notice in ordinary cases (c). In practice, it is usually added after the notice by the casual ejector; but there seems to be no necessity for both notices, as this notice comprises the whole of the substance of the other.

The declaration is served in the manner directed *ante*, 530 to 534.

*Bail*] Upon the appearance of the party at the day prescribed, or in case of non-appearance on making the usual affidavit of the service of the declaration and notice, (*ante*, 534), it shall be lawful for the landlord, (producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid), to move the Court for a rule for such tenant or person to shew cause, within a time to be fixed by the Court on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, besides entering into the common rule, and giving the common undertaking, should not undertake, in case a verdict shall pass for the plaintiff, to give the plaintiff a judgment, to be entered up against the real defendant, of the term next preceding the time of trial, and also why he should not enter into a recognizance, by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action; and it shall be lawful for the Court upon cause shewn, or upon

(c) See *Doe Marquis of Anglesey v. Roe*, 2 D. & R. 565. See form where tenant held under a lease, Chit. Forms, 482; the like, where he held from year to year, *Id.*

(a) See the forms, Chit. Forms, 483.

(b) See form of notice, Chit. Forms, 483.

(c) *Anon.* 1 D. & R. 435; *Goodtitle v. Nottile*, 5 B. & Ald. 849, 6 Moore, 56 (a). See a form, Tidd's Forms, 623.

affidavit of the service of the rule in case no cause shall be shewn, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to give such undertakings, and find such bail, with such conditions, and in such manner, as shall be specified in the said rule, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court to enlarge the time for obeying the same, then, upon affidavit of the service of such order, a rule absolute shall be made for entering up judgment for the plaintiff. (1 G. 4, c. 87, s. 1).

This proceeding comprises three motions:

1. A motion for a rule to shew cause why the tenant should not give the undertaking, and enter into the recognizance above mentioned, founded upon the affidavit described by the act (e). It is not necessary to express in the rule the amount of the security required (f). It is advisable that the affidavit should state the annual value of the premises, so that the Court may be enabled to fix the sum for which the security shall be given (g). *Draw up the rule, and serve a copy of it upon the tenant in possession, either personally, or by leaving it for him at his most usual place of abode.*

2. A motion to make that rule absolute on an affidavit of service (h). The time within which the undertaking is to be given, and the recognizance entered into, as required by the act, is fixed by the Court in this rule absolute (i). In one case, the Court of Common Pleas, on making a rule absolute (no cause being shewn) for the tenant's undertaking to give the plaintiff judgment, to be entered up against the real defendant, and to enter into a recognizance in a reasonable sum conditioned to pay the costs and damages, which should be recovered by the plaintiff in the action, ordered the tenant to appear in the next succeeding term to find such bail as were specified in the former rule; and on no cause being shewn to that order, they directed the rule for entering up judgment for the plaintiff to be made absolute (j). Usually bail is required for a sum sufficient to cover a year's value and £40 for costs (k). *Draw up the rule, and serve it in the same manner as the rule nisi.*

3. If no undertaking be given and recognizance entered into, within the time given for that purpose by the Court, the lessor of the plaintiff may immediately move for judgment, *as infra*.

Bail is put in, and the recognizance taken, in nearly the same manner as in ordinary cases; (see 1 G. 4, c. 87, s. 4); except that the tenant himself must join in the recognizance; (*Id.* s. 1); but he cannot be

(d) Chit. Sum. Pract. 230.

(e) See form of affidavit, where the tenant held under a lease, Chit. Forms, 391, 483; the like, where he held from year to year, *Id.* 484; and of rule *nisi* thereon, *Id.* 486; and see Chapman Pract. 210.

(f) *Doe Phillips v. Roe*, 5 B. & Ald. 766, 1 D. & R. 433, S. C.

VOL. II.

(g) Chit. Sum. Pract. 230.

(h) See form of the affidavit of service, Chit. Forms, 487; and see the form of the rule absolute, *Id.*

(i) See *Doe Anglessa v. Brown*, 2 D. & R. 688, 3 D. & R. 236, S. C.

(j) *Doe Sampson v. Roe*, 6 Moore, 54.

(k) *Query*—as to mesne profits, see *Id.*

examined as to his sufficiency (*k*). The recognizance should be intitled in the cause against the real defendant (*l*). The officer of the Court with whom the recognizance is filed, is to file it on payment of 2s. 6d. It must be put in suit in six months after the landlord has obtained possession. (1 G. 4, c. 87, s. 7).

The undertaking mentioned in the statute is included in the consent rule (*m*).

*Judgment against the casual ejector.*] If the tenant put in bail, except to them or not (*n*), as in ordinary cases, in order to compel a justification. (*ante*, Vol. 1, 157, &c.). And if he fail to justify his bail, or if no bail be put in, or the defendant have not entered into the consent rule, with the undertaking above mentioned, within the time given by the Court for that purpose, then, upon affidavit of that fact, and of the service of the rule absolute above mentioned, you may move for judgment against the casual ejector; and the rule granted in such a case, is a rule absolute in the first instance (*o*).

This judgment is signed, and the writ of possession sued out and executed, as directed, *ante*, 536, 537.

*Appearance and plea.*] Putting in and perfecting bail are not in this case, as in ordinary cases, an appearance of the tenant; but the tenant must also enter an appearance, and enter into the consent rule, as in ordinary cases. For this purpose, *Get a blank consent rule, containing the undertaking above mentioned, at the rule office, and fill it up* (*m*); and let the tenant's attorney sign the rule, leaving room above his signature for that of the attorney for the plaintiff. Take this rule to the filacer, if the action be by original, and enter an appearance for the tenant, as directed, *ante*, 540, and the filacer will thereupon mark the consent rule (*p*). Next engross the general issue upon plain paper (*q*); annex the rule to it, and leave both at the Judge's chambers. Pay the Judge's clerk 2s. All this should be done before the expiration of the time limited for that purpose by the Court. So, care must be taken to put in bail, (and such bail seemingly as are required in error, see Vol. 1, 344) within the same time; and if excepted to, they must be justified within the time limited for that purpose by the practice of the Court, unless the Court grant a further time to justify: otherwise the appearance and plea may be treated as a nullity, and the plaintiff may move for judgment against the casual ejector, as above directed.

*Issue, &c.*] When the time given to the tenant to put in bail, &c.,

(*k*) *Semb.* See *Keene v. Deardon*, 8 East, 290. See the forms, Chit. Forms, 489; see also the form of the notice of filing the recognizance, *Id.* 490.

(*l*) *Doe Durant v. Moore*, 6 Bing. 656.

(*m*) See form, Chit. Forms, 491.

(*n*) See form of notice of exception, Chit. Forms, 490.

(*o*) See the form of the affidavit and rule, Chit. Forms, 489.

(*p*) See as to the form of *præcipe* for appearance, Chit. Forms, 448.

(*q*) See form, Chit. Forms, 452.

has expired, *Let the plaintiff's attorney call at the Judge's chambers and get the consent rule; and, after separating the plea from the rule, let him sign the latter, and take it to the clerk of the rules, who will thereupon draw up the rule.*

*Then make up the issue on plain paper, as directed ante, 545 (r), indorse upon it the notice of trial (s); annex a copy of the consent rule to it, and deliver it to the defendant's attorney.*

*Make up your nisi prius record (t); sue out jury process (u); enter your cause for trial, and deliver your briefs to counsel, as directed ante, 546.*

*Trial, &c.]* If the defendant do not appear at the trial, and confess lease, entry, and ouster, the plaintiff is not to be nonsuit, as in ordinary cases of ejectment. But, by statute 1 G. 4, c. 87, s. 2, wherever it shall appear on the trial of an ejectment, at the suit of a landlord against a tenant, that such tenant, or his attorney, hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease, entry, and ouster, but the production of the consent rule and undertaking of the defendant shall in all such cases be sufficient evidence of lease, entry, and ouster.

Nor are the *damages* in this case, as in the ordinary cases of ejectment, merely nominal; for by 1 G. 4, c. 87, s. 2, the Judge before whom the cause shall come on to be tried, shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the *mesne* profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day, to be specially mentioned therein; and the jury on the trial, finding for the plaintiff, shall, in such case, give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such *mesne* profits; provided always, that nothing herein-before contained shall be construed to bar any such landlord from bringing an action of trespass for the *mesne* profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment.

But by 1 G. 4, c. 87, s. 3, in all cases in which such undertaking shall have been given, and security found as aforesaid, if upon the trial a verdict shall pass for the plaintiff, but it shall appear to the Judge before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, it shall be lawful for the Judge to order the execu-

(r) See form, Chit. Forms, 491.

(s) See Chit. Forms, 491.

(t) See form, Chit. Forms, 491.

(u) Id. 491.

tion of the judgment to be stayed absolutely till the fifth day of the term then next following; which order the Judge shall in all other cases make upon the requisition of the defendant, in case he shall forthwith undertake(y) to find, and on condition that within four days from the day of the trial, he shall actually find security by the recognizance of himself and two sufficient sureties, in such reasonable sum as the Judge shall direct, conditioned not to commit any waste, or any act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made, (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be. Under this section, the defendant must give two *additional* sureties on bringing a writ of error, although he has already given the two sureties on his appearance under the first section of the act (z).

On the other hand, in all cases where the landlord proceeds under this statute, and the tenant finds bail, &c., if the landlord be nonsuit, or a verdict pass against him upon the merits, there shall be judgment against him with *double* costs. (1 G. 4, c. 87, s. 6).

#### SECT. 5.

#### *Proceedings in Ejectment by Landlord, under 1 Will. 4, c. 70, s. 36, 37.*

The 1 Will. 4, c. 70, s. 36, after reciting that "*landlords, to whom a right of entry into or upon any lands or hereditaments may accrue during or immediately after Hilary and Trinity terms respectively, are at present unable to prosecute ejectments against their tenants so as to try the same at the assizes immediately ensuing, whereby much delay is occasioned in the recovery of the possession of lands and tenements wrongfully withheld by tenants against their landlords;*" enacts, that "*in all actions of ejectment hereafter to be brought in any of his Majesty's Courts at Westminster, by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord, in or after Hilary or Trinity terms respectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within ten days after*

(y) See form of Recognizance, Chit. Forms, 490.

(z) *Doe Durant v. Moore*, 6 Bing.

656, 7 Id. 124, 4 M. & P. 761, 1 Dowl. P. C. 203, S. C.

such tenancy shall expire, or right of entry accrue as aforesaid, to serve a declaration in ejectment, intituled of the day next after the day of the demise in such declaration, whether the same shall be in term or vacation, with a notice thereunto subscribed, requiring the tenant or tenants in possession to appear and plead thereto within ten days in the Court in which such action may be brought; and proceedings shall be had on such declaration, and rules to plead (a) entered and given, in such and the same manner, as nearly as may be, as if such declaration had been duly served before the preceding term: provided always, that no judgment shall be signed against the casual ejector until default of appearance and plea within such ten days, and that at least six clear days' notice of trial shall be given to the defendant before the commission day of the assizes at which such ejectment is intended to be tried; provided also, that any defendant in such action may, at any time before the trial thereof, apply to a judge of either of his Majesty's superior Courts at Westminster, by summons in the usual manner, for time to plead, or for staying or setting aside the proceedings, or for postponing the trial until the next assizes; and that it shall be lawful for the Judge in his discretion, to make such order in the said cause as to him shall seem expedient."

Section 37 enacts, "that in making up the record of the proceedings on any such declaration in ejectment, it shall be lawful to intitle such declaration specially of the day next after the day of the demise therein, whether such day shall be in term or in vacation, and no judgment thereupon shall be avoided or reversed by reason only of such special title."

It will be observed, that this statute is applicable only to ejectments by landlords; also that the tenancy must expire, or the right of entry accrue, in or after *Hilary* or *Trinity* (b) terms, and therefore, if the tenancy expired, or the right of entry accrued, before the first day of either of those terms, the case would not fall within the statute. It also extends only to ejectments triable at the assizes, and not to those in Middlesex or London (c).

*Declaration and notice.*] The declaration is in the usual form (see ante, 529), except that it must be intituled of the day next after the day of the demise laid in such declaration, and this whether in term or vacation (d). At the foot of the declaration a notice should be added, requiring the defendant, within ten days, to appear and plead to it (e). In other respects this notice is the same as the usual notice, ante, 530.

This declaration is served in the manner directed, ante, 530 to 533, except that the service must take place within ten days after the tenancy expired, or the right of entry accrued. (See the statute,

(a) It seems a rule to plead is not necessary. See 2 Adam's Eject. 2d ed. 222, ante, 537.

(b) Doe v. Roe, 2 C. & J. 123, 1 Dowl. P. C. 304, S. C.

(c) Doe Norris v. Roe, 1 Dowl. P. C. 547.

(d) See the form, Chit. Forms, 493.

(e) See the form, Chit. Forms, 493.

*supra*. An objection however to the service, on account of its not having taken place within these ten days, cannot be taken at the trial (*s*), it is merely matter of irregularity.

*Judgment against the casual ejector.*] If the tenant makes default in not appearing and pleading, within ten days after the service of the declaration (one day inclusive and the other exclusive), the plaintiff will be entitled to judgment against the casual ejector, and he should proceed in nearly the same manner as in other cases noticed *ante*, 536, 537. The practice as to the mode of obtaining such judgment is there noticed. The only main difference appears to be, as regards the affidavit for that purpose, which is the same as usual, except that it states when the tenancy expired or right of entry accrued, and when the declaration was served, in order that the Court may see that the proceedings are in accordance with the act (*t*).

*Appearance and plea, &c.*] The practice as to these is the same as in ordinary cases, *mutatis mutandis*. (See *ante*, 538). A Judge may grant an order for time to appear or plead as in other cases.

*Other proceedings.*] The plaintiff must give to the defendant six clear days' notice of trial (exclusive of the day it is given and the commission day) before the commission day of the assizes. It is not necessary to prove at the trial that this notice was given (*u*); and if not duly given, the defendant, by defending the action at the trial, will cure any objection on account of it (*x*).

The Court or a Judge, on summons, may, in their discretion, stay or set aside the proceedings, or postpone the trial until the next assizes. In support of the application, an affidavit of facts should be produced to induce the Court or Judge to grant it.

In making up the record of the proceedings, the declaration may be intitled specially of the day next after the day of the demise laid in the declaration, and the judgment will not be avoided or reversed by reason only of such special title. (See the statute, *ante*, 569).

The rest of the proceedings are the same as in ordinary cases, *mutatis mutandis*. (See *ante*, 542 to 556).

(*s*) *Doe Rankin v. Brindley*, 4 B. & Adol. 84, 1 Nev. & M. 1, S. C.

(*t*) See a form, Chit. Forms, 494.

(*u*) *Doe Antrobus v. Jephson*, 3 B. &

Adolp. 402; *Doe Rankin v. Roe*, 1 Nev. & M. 1, 4 B. & Adolp. 84, S. C.

(*x*) *Id.*

## SECT. 6.

*Action for Mesne Profits.*

The action of trespass for mesne profits may be brought for the amount of the profits derived by the defendant from the premises recovered in ejectment; that is, for the amount of the yearly value of the premises, whilst he held them against the lessor's title. But where an actual entry has been made, to avoid a fine, this action can be brought only for the mesne profits accruing after the entry was made (y). So, where the plaintiff has had judgment against the casual ejector, he may recover his costs in this action although not taxed against the tenant or person last in possession (z); but if the ejectment were defended, and the taxed costs paid, the extra costs would not be recoverable in this form of action (a).

The action may be brought in the name, either of the nominal plaintiff in the ejectment, or of his lessor (b). A tenant in common who has recovered in ejectment may maintain an action for mesne profits against his companion (c). A joint action for mesne profits may be maintained by several lessors of the plaintiff in ejectment after recovery therein, although the declaration in ejectment contained only a separate demise by each (d). The action ought in general to be brought against the person against whom the judgment in ejectment is given (e). It has, it seems, been doubted whether a tenant, whose under tenant holds over after the expiration of his term, is liable for mesne profits; but in practice the former is often joined in the action with his under tenant; and he appears to be liable, at all events, if he has expressly recognised the acts of his under tenant, and has received rent from him for the period possession was improperly detained (f). And in general, any person found in possession, after a recovery in ejectment, is liable to the action; and it is no defence that he was on the premises as the agent, and under the licence of the defendant in ejectment, for no man can license another to do an illegal act (g). The defendant, however, in such a case, will only be liable for the mesne profits for the time he was in possession (h). The action cannot be maintained against

(y) See *Compere v. Hicks*, 7 T. R. 727; and see *Berrington v. Parkhurst*, 2 Str. 1086; 4 Brown, P. C. 353.

(z) *Gulliver v. Drinkwater*, 2 T. R. 261; *Doe v. Davis*, 1 Esp. 358, 6 T. R. 593, S. C.; *Symonds v. Page*, 1 C. & J. 29; *Goodtitle v. Tombs*, 3 Wils. 121, Bul. N. P. 88, 89; and see *Hunter v. Britts*, 3 Camp. 455.

(a) *Gulliver v. Drinkwater*, 2 T. R. 261; *Doe v. Davis*, 1 Esp. 358. Query, if the extra costs would be recoverable in any form of action, see 1 Camp.

151, 4 Taunt. 7, 4 Bing. 160.

(b) *Aslin v. Parkin*, 2 Bur. 665.

(c) *Goodtitle v. Tombs*, 3 Wils. 118;

*Cutting v. Derby*, 2 Bla. Rep. 1077.

(d) *Chamier v. Clingo*, 5 M. & Sel. 64,

2 Chit. Rep. 410, S. C.

(e) 1 Chit. Pl. 5 ed. 224.

(f) *Id.*; and see *per Mansfield*, C. J.

in *Burne v. Richardson*, 4 Taunt. 720.

(g) 1 Chit. Pl. 5 ed. 224.

(h) 1 Woodf. L. & T. 7 ed. 419; *Ad.*

*Eject. 331; Aslin v. Parkin*, 2 Burr. 668,

*Doe James v. Stanton*, 2 B. & Ald. 373.



executors or administrators for the profits during the lifetime of the testator or intestate, and received by him (i); except indeed for the profits received within six calendar months before the death of the testator or intestate, and then only if the action for them be brought by the executor or administrator within one year of the death of the testator or intestate. (3 & 4 W. 4, c. 42, s. 2).

The defendant cannot be holden to bail, as of course; but an application must be made for a Judge's order for that purpose; which, however, is seldom denied. (*See* *W. 1*, 82).

The defendant may plead the statute of limitations as to all the profits, excepting those which may have accrued within the last six years (j). But he cannot, it seems, plead a discharge under the insolvent act (k). He was not, previously to the 3 & 4 W. 4, c. 42, s. 21, allowed to pay money into Court (l). If he were defendant also in the ejectment, he cannot dispute the title of the lessor of the plaintiff, from the day of the demise laid in the declaration (m).

If the action be brought in the name of the nominal plaintiff, the Court, upon application, will stay the proceedings until security be given for costs (n).

The jury are not, in estimating the damages, confined to give the mere rent or annual value of the premises; but may give such extra damages as they may think fit (o). The costs of the ejectment are recoverable in all cases, and this, although they have not been taxed (p); and the plaintiff may recover, by way of damages, the costs incurred by him, in a court of error, by reversing the judgment in ejectment erroneously obtained by the defendant (q). The jury, however, are to give damages only for the time the defendant is proved to have been in actual possession (r), and since the plaintiff's title accrued; but the plaintiff is not restricted to the time stated in his demise in the declaration in ejectment, but may also recover the profits which accrued previously, if he had title to the premises at the time (s). Where an actual entry, however, has been made, to avoid a fine, as above mentioned, the jury can give damages only as to the profits accruing since the time of the entry.

If the action is brought, pending a writ of error on the judgment in ejectment, the plaintiff may proceed to judgment; but the Court will stay execution, until the writ of error is determined (t).

If the plaintiff recover less than 40s. he shall have no more costs than damages, unless the Judge certify (u).

In all other respects, the proceedings in this action are the same as in ordinary cases.

(i) See 1 Chit. Pl. 103, 5 ed.

(j) Bul. N. P. 88.

(k) *Lloyd v. Peel*, 3 B. & Ald. 407; and see *Goodtitle v. North*, 2 Doug. 584.

(l) *Holdfast v. Morris*, 2 Wils. 115. See as to payment of money into Court generally, *post*, Book 4, Part 1, chap. 9.

(m) See *Adams on Eject.* 333; *Chatfield v. Parker*, 8 B. & Cres. 551, (n. a).

(n) Bul. N. P. 89; Say. 78.

(o) *Goodtitle v. Tombs*, 3 Wils. 121.

(p) *Symonds v. Page*, 1 C. & J. 29.

(q) *Nowell v. Roake*, 7 B. & Cres. 404, 1 M. & R. 170, S. C.

(r) *Stanyngrove v. Cosins*, Barnes, 456.

(s) Bul. N. P. 87.

(t) Ca. Pr. C. B. 46.

(u) *Doe v. Davis*, 1 Esp. 358, 6 T. R. 593, S. C.

## CHAPTER II.

## REPLEVIN.

- SECT. 1. *The Distress*, 573 to 576.  
 2. *Replevin*, 577 to 597.

## SECT. 1.

*The Distress.*

*How made.*] A DISTRESS for rent (to which these few observations shall be confined) is made by entering upon the premises (a) and seizing any piece of furniture or chattel distrainable, saying, at the same time, that you seize that in the name of all the chattels upon the premises, to the value of the rent distrained for (b); and stating the cause of the distress particularly; and if the distress be made by virtue of any particular authority, let it be mentioned. A landlord, however, may distrain, not only upon the premises demised; but also the cattle or stock of his tenant depasturing on any common appendant or appurtenant or any ways belonging to the same. (11 G. 2, c. 19, s. 8) (c). The distress must not be made on a highway (d). It is made either by the landlord in person, or by some person deputed by him by warrant (e). After seizure, an inventory should be taken of the distrainable goods upon the premises (f); copy it, and write at the foot of the copy a notice stating the cause of the distress, and that unless the rent be paid within five days, the goods shall be appraised and sold (g); and leave this copy "at the chief mansion house, or other most notorious place on the premises," (2 W. & M. sess. 1, c. 5, s. 2), or serve it personally on the tenant (h). If you remove the goods, state in your notice the place to which you have removed them.

This distress must be made in the day time. It may be made a

- (a) See 52 H. 3, c. 21; 2 Inst. 131; 8 B. & Cres. 141, 3 Y. & J. 344, S. C.  
 Mir. c. 2, s. 26. (e) See the form of the warrant, Chit. Forms, 496.  
 (b) *Dod v. Monger*, 6 Mod. 215; (f) See the form, Chit. Forms, 496.  
*Swann v. Earl Falmouth*, 8 B. & Cres. 456; *Wood v. Nunn*, 5 Bing. 10. (g) See the forms, Chit. Forms, 496.  
 (c) See *Furneaux v. Fotherby*, 4 Camp. 136. (h) *Walter v. Rumball*, 1 Salk. 247, 1 Ld. Raym. 53, S. C.  
 (d) 52 Hen. 3, c. 51; *Buszard v. Capel*,

any time during the term for which the premises are demised, or within six months after the determination thereof, provided the landlord's title and the tenant's possession continue at the time of the distress. (8 *A. c.* 14, *s.* 6, 7; 3 & 4 *W.* 4, *c.* 42, *s.* 37, 38) (*i*). The landlord cannot break open the outer door of a house, to make a distress (*k*); nor can he break open or throw down gates or inclosures for that purpose (*l*). But if he have entered the house, he may, if necessary, break open an inner door, &c. (*m*).

*Removal of the goods.*] The landlord may either remove the goods immediately, or he may allow them to remain on the premises for five days inclusive of the day of the seizure, and a reasonable time afterwards, leaving a person there in the care and possession of them, to prevent them from being clandestinely removed. He cannot, however, leave them on the premises an unreasonable time longer than the time above mentioned, otherwise he will render himself liable to an action of trespass (*n*); unless he have the tenant's consent to do so; and tenants usually request this as an indulgence, in order that they may be enabled in the mean time to raise money for the payment of the rent, or have an opportunity to replevy the distress (*o*). Get the tenant to give you a written memorandum of his consent to your continuing in possession (*p*). By 2 *W. & M. sess.* 1, *c.* 5, *s.* 3, however, sheaves of corn, &c., when distrained, may be impounded on the premises, until appraised and sold. And by 11 *G. 2, c.* 19, *s.* 8, when corn, grass, &c. growing, is distrained, it may be laid up in barns or other proper places on the premises, and shall not be appraised or sold until it shall have been cut, gathered, cured and made (*q*): if sold before that time, the sale is void, and the property in the corn is not thereby divested out of the tenant, or passed to the vendee (*r*). And lastly, by 11 *G. 2, c.* 19, *s.* 10, any goods, when distrained, may be impounded on the premises, and may there be appraised and sold, in like manner as the distrainer might have done before off the premises.

If you remove the goods distrained, if they be household goods or other dead chattel, you must place them in a pound covert; that is, in some covered place of safety, where they may not be exposed to injury from the weather (*s*). But where cattle are distrained, they may be placed either in a pound overt or pound covert, at the option

(i) See *Burne v. Richardson*, 4 Taunt. 720; *Nuttall v. Staunton*, 6 D. & Ry. 155, 4 B. & Cres. 51, S. C., Chit. Coll. Stat. 665.

(k) Co. Lit. 161; Comb. 17; 9 Vin. Abr. 128. See *Gould v. Bradstock*, 4 Taunt. 562.

(l) Co. Lit. 161.

(m) Co. Lit. 161; Comb. 17; *Browning v. Dann*, Hardw. 168, Bul. N. P. 81.

(n) *Winterbourne v. Morgan*, 11 East, 395; *Griffin v. Scott*, 2 Str. 717, 2 Ld.

Raym. 1424, S. C.; *Pitt v. Shew*, 4 B. & Ald. 208. See *Wallace v. King*, 1 H. Bl. 13; *Etherton v. Popplewell*, 1 East, 139; 11 *G. 2, c.* 19, *s.* 19.

(o) See *Washburn v. Black*, 11 East, 405, n. (*a*); *Fisher v. Algar*, 2 C. & P. 374.

(p) See the form, Chit. Forms, 497.

(q) See *Peacock v. Purvis*, 2 B. & B. 362, 5 Moore, 79, S. C.; *Clark v. Gashearth*, 8 Taunt. 431, 2 Moore, 491, S. C.

(r) *Owen v. Leigh*, 3 B. & Ald. 470.

(s) Co. Lit. 47.

of the distrainor: if he place them in a pound covert, as in a stable or the like, he must feed and sustain them; but if in a pound overt, common or special, the owner must attend at his peril; and for that purpose, if the distress be impounded in a special pound overt, notice thereof must be given to the owner (t). By 52 Hen. 3, c. 4, a distress shall not be driven out of the county where it is taken (u); and by 1 & 2 P. & M. c. 12, s. 1, a distress of cattle shall not be driven out of the hundred, rape, wapentake, or lathe, where it is taken, unless to a pound overt within the same shire, and not above three miles distant from the place where such distress was taken (x).

*Appraisement and sale.*] By 2 W. & M. sess. 1, c. 5, s. 2, if the owner of the goods distrained shall not, within five days next after such distress taken, and notice thereof left at the chief mansion house, or other most notorious place on the premises, replevy the same; in such case the person distraining shall, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place (y) where such distress shall be taken, cause the goods &c., so distrained, to be appraised by two sworn appraisers (whom such sheriff, under-sheriff, or constable, shall swear to appraise the same truly, according to the best of their understanding); and, after such appraisement, shall sell the same for the best price that can be gotten for them, for satisfaction of the rent and charges of distress, appraisement, and sale; leaving the overplus (if any) with the sheriff, under-sheriff, or constable, for the owner's use. Previous to this statute, a distress, even for rent, could not be sold.

Upon the sixth day, (inclusive of that on which the distress was made (z),) or within a reasonable time afterwards (a), search at the sheriff's office if the goods have been replevied; if not (b), send for the constable of the hundred, parish, or place (c), where the distress was made, and also two sworn appraisers (d); the constable will then administer the usual oath to the appraisers (e), and indorse a memorandum of it upon the inventory (f). The appraisers, being sworn, proceed to appraise the goods; and having done so, write their appraisement also upon the inventory (g). The constable must be present during the appraisement (h). The appraisement should, it seems, be stamped. (55 G. 3, c. 184). The goods are usually sold to the dis-

(t) Id.

(u) See 2 Inst. 106.

(x) *Gimbart v. Pelah*, 2 Stra. 1272.

(y) See *Avenell v. Croker*, 1 M. & M. 172; *Walter v. Rumbal*, 1 Ld. Raym. 53, 1 Salk. 247, S. C.; *Wallace v. King*, 1 H. Bl. 14.

(z) *Wallace v. King*, 1 H. Bl. 13.

(a) *Pitt v. Shew*, 4 B. & Ald. 208.

(b) If they have been replevied, you cannot sell them, though the replevin was had after the five days. *Jacob v. King*, 1 Marsh. 135, 5 Taunt. 451, S. C.

(c) He must not be the constable of

another parish; *Avenell v. Croker*, 1 M. & M. 172; *Wallace v. King*, 1 H. Bl. 13; and see *Walter v. Rumbal*, 1 Ld. Raym. 53, 1 Salk. 247, S. C.

(d) Not the person distraining, see *Westwood v. Cowne*, 1 Stark. 172; *Lyons v. Weldon*, 2 Bing. 337.

(e) The constable must swear the appraisers before the appraisement. *Kenney v. May*, 2 M. & Malk. 56. See the form, Chit. Forms, 489.

(f) Id.

(g) Id.

(h) *Kenney v. May*, 2 M. & Malk. 56.

trainer or a third person, for the sum at which they were appraised; and a receipt for the sum paid for them entered on the inventory, and witnessed by the constable (*i*). Upon the equity of the 2 *W. & M. sess.* 1, c. 5, s. 2, the distrainer must sell for the best price that can be obtained for the goods, and an action lies if he does not. The price at which the goods were appraised will be presumed to be the best till the contrary is proved (*j*). It appears that there is no order required by law to be observed in the sale of the goods (*k*). If there be a surplus, after payment of the rent and charges, let it be given to the constable, to keep for the owner. (2 *W. & M. sess.* 1, c. 5, s. 2, *ante*, 575). If goods to the amount of the rent and charges have not been distrained, or if the distress die in the pound, or be otherwise destroyed by the act of God (*l*), the landlord may distrain again (*m*). As to the costs of distraining, &c. where the rent in arrear does not exceed 20*l.*, see 57 *G. 3*, c. 93.

Where a distress shall be made for rent justly due, and any irregularity shall afterwards be committed by the party distraining or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party aggrieved may recover satisfaction for the special damage in the action of trespass or on the case; and if he recover, he shall have full costs. (11 *G. 2*, c. 19, s. 19). But he shall not recover in such an action, if tender of amends have been made before action brought. (*Id.* s. 20) (*n*). If, however, the first entry be illegal and unjustifiable, as if no rent whatever be due (*o*), or if the party distraining break open the outer door or the like, none of his proceedings would be protected by this act (*p*).

I have treated, thus concisely, of the manner of making a distress under this head of *replevin*, because the action of *replevin* usually originates in a distress. But it is a mistake to think that *replevin* lies only in the case of a wrongful distress; although in practice it is usually confined to that injury, the action in fact lies in all cases where mere personal chattels have been wrongfully taken and detained from a person, without a lawful authority (*q*).

(i) See upon this subject, generally, Gilbert, *Distress and Replevin*; Woodfall, L. & T. by Harrison.

(j) *Walter v. Rumbal*, 4 Mod. 390, Com. Dig. *Distress*, A.

(k) See *Jenner v. Yolland*, 6 Price, 5, 2 Chit. Rep. 187, S. C.

(l) *Vasper v. Eddows*, 1 Salk. 248, 1 Ld. Raym. 719, S. C.

(m) See *Bradby*, 130; 1 Burn J. 26 ed. 988; *Hudd v. Ravenor*, 2 B. & B. 662, 5 Moore, 542, S. C.

(n) See *Winterbourne v. Morgan*, 11 East, 395; *Griffin v. Scott*, 2 Str. 717, 2 Ld. Raym. 1424, S. C.; *Wallace v. King*, 1 H. Bl. 13; *Etherton v. Popplewell*, 1 East, 139; *Branscomb v. Bridges*, 1 B. & Cres. 145, 2 D. & R. 256, S. C.

(o) See *Whitworth v. Smith*, 5 C. & P. 250.

(p) See *Avenell v. Croker*, 1 M. & M. 173.

(q) See 1 Chit. Pl. 5 ed. 188.

SECT. 2.

*Replevin (r).*

*How obtained.*] Formerly, when the party distrained upon intended to dispute the right of the distress, he must have sued out a writ of *replegiari facias*. This writ, being an original, issued out of Chancery, and was obtained of the cursitor; it commanded the sheriff to deliver the things distrained to the owner, and afterwards to do justice in respect of the matter in dispute in his own county court. Upon receipt of the writ, the sheriff issued his precept to his bailiff to *replevy* the goods, and a summons requiring the defendant to appear at the next county court to answer the plaintiff for having taken them. The plaintiff then levied his plaint in the county court, and so proceeded in the action. If the sheriff made the *replevin*, it was not necessary for him to return the writ; but if the goods were not *replevied*, the sheriff must have returned the writ (2 H. 7, 5, b), otherwise the party might proceed to attachment against him. (Reg. 81). After the return of the writ, if the sheriff had not executed it, the party might sue out an *alias*, and after that a *pluries*; or if the sheriff returned that the goods were eloigned, that is, removed so that he could not find them, the party might sue out a *capias in withernam* (s), requiring the sheriff to take other cattle and goods of the distrainer to the value of the goods distrained, and deliver them to the party whose goods had been eloigned, to keep until his own goods should be restored. This writ also required the sheriff to put by gages and safe pledges the defendant, that he be before the king on the return of the writ, to answer to the plaintiff of the taking and detaining of his cattle, &c. If the distrainer, or other person, claimed a property in the goods distrained, and the sheriff returned this as his reason for not executing the writ of *replevin*, a writ *de proprietate probandâ* (t), thereupon issued, requiring the sheriff to inquire by inquest, whether the goods were the property of the plaintiff, or of the person claiming them; if of the plaintiff, then to replevy them, and to attach the party claiming them, that he be before the king at the return of the writ, to answer the contempt and also damages to the plaintiff, and to put by gages and safe pledges the defendant, that he be also before the king at the same time to answer to the plaintiff as to the taking of the goods. According to the tenor of these two latter writs, we may perceive that the suit was no longer to be prosecuted in the county court, but before the king in his Court at Westminster.

This mode of proceeding, by original writ, however, being extremely tedious, and the cattle, or other goods, being, in the mean time, detained from the owner, to his great loss and damage, it was directed

(r) The proceedings in replevin suits removed from inferior courts not affected by the 2 W. 4, c. 39.

(s) See a form, Chit. Forms, 801.  
(t) Id.

and enacted by the statute of Marlbridge (52 H. 3, c. 21), that the sheriff, without any writ being sued out of Chancery, shall proceed to replevy the goods, immediately upon complaint being made to him; and by 1 & 2 P. & M. c. 12, the sheriff of every county shall appoint four deputies at least, dwelling not above twelve miles distant from each other, for the purpose of making replevins.

Before the sheriff, or his deputy, however, can replevy, either upon writ or application, he must take pledges from the plaintiff, not only to prosecute his suit, but also to return the cattle or goods, if a return should be adjudged; and, if he take pledges in any other manner, he shall be answerable to the defendant for the price or value of the cattle or goods replevied. The security taken by the sheriff, in pursuance of this act, is usually a bond, conditioned as is above mentioned (v). Also, by 11 G. 2, c. 19, s. 23, in every replevin of a distress for rent, the sheriff, or his deputy, shall take from the plaintiff, and two responsible persons, as sureties, a bond in double the value of the goods distrained (to be ascertained on the oath of one witness), conditioned for prosecuting the suit with effect and without delay, and for a return of the goods, if a return should be awarded (u). A distress for a rent charge is within the act (w). The bond should pursue the terms of the statute. It has been held, however, that a bond, conditioned to prosecute the action with effect, and to indemnify the sheriff, is good; and may be assigned and proceeded on in the name of the assignee, under the statute, although it do not require, by the condition, that the suit shall be prosecuted without delay, and although it contain an undertaking to indemnify the sheriff (x). And although the statute directs the bond to be taken with two sureties, yet a bond by one surety only has been holden good (y). As to the proceeding on this bond, and the liability of the sheriff and sureties, see *post*, 595. Where one of the sureties was a material witness for the plaintiff, the Court of Common Pleas allowed another to be substituted for him (z).

The mode of proceeding is thus: *Let the party intending to replevy give the names of two sufficient housekeepers of the city or county where the distress was made, to the sheriff's officer, who (after satisfying himself as to their sufficiency) will give him a certificate to the sheriff to that effect. Take this certificate to the sheriff's office of that city or county, or to the office of his deputy; and, upon the bond being filled up, let it be executed by the plaintiff and his two sureties. A precept or warrant is then made out, commanding one of the sheriff's officers to replevy the goods, and deliver them to the plaintiff; and also to summon the defendant to appear at the next county court, to answer*

(v) *Blackett v. Crissop*, 1 Ld. Raym. 278.

(u) See form of this bond, Chit. Forms, 578.

(w) *Short v. Hubbard*, 2 Bing. 349, 9 Moore, 667, S. C.

(x) *Dunbary v. Dun*, 10 Price, 54; and

see *Short v. Hubbard*, 2 Bing. 349, 9 Moore, 667, S. C.

(y) *Austen v. Howard*, 7 Taunt. 28; and see *Id.* 327, 1 Moore, 68, 2 Marsh. 359, S. C.

(z) *Bailey v. Bailey*, 1 Bing. 92, 7 Moore, 439, S. C.

the plaintiff for the taking, &c. (a). Upon this precept, the officer will replevy the goods, if found within the county, &c., the plaintiff, or some person on his behalf, accompanying him in order to identify them; and, in doing this, the officer may use force if the distrainer make resistance, and may break open even the outer door of his dwelling-house, if the goods be there, having first signified the cause of his coming, and desired admittance (b). Care should be taken, in cases of distress for rent, to replevy before the expiration of five days inclusive after the distress made; otherwise, the distrainer may sell the goods: though, indèed, they may be replevied at any time before they have been actually sold; and this, although after the five days. (See *ante*, 575) (c). In all other cases of distress at common law, no time is limited for replevying, because the distrainer cannot sell the distress.

If the goods have been eiogned, so that the sheriff cannot replevy them, then upon plaint being levied in the county court by the plaintiff, the sheriff may issue a precept in the nature of a *capias in withernam* (d), commanding his officer to take goods or cattle of the defendant, to the value of those taken by him, and deliver them to the plaintiff; the plaintiff having first given him a bond with sureties, similar to that above mentioned, conditioned to prosecute his suit, and to return the goods so to be delivered to him, if a return of them should be afterwards adjudged.

*Plaint in county court.*] After the goods have been replevied and delivered to the plaintiff, he must, according to the terms of his bond, levy his plaint at the next county court, and prosecute his suit with effect and without delay. If he do not levy his plaint at the next county court, or if he make default in any subsequent part of the proceedings, or do not prosecute the suit with success, either in the county court or in this Court, after the removal of the cause (e), the defendant may take an assignment of the replevin bond, and may proceed thereon against the plaintiff and his pledges, in the same manner as a plaintiff proceeds upon a bail bond (f). As to what will be a forfeiture of the replevin bond, see *post*, 595. Until the plaint is entered, there is no commencement of the suit, of which a superior Court can take notice (g). The entering of the plaint is the act of the party, and if no plaint be entered, the bond is forfeited (h). The act of the sheriff, or his deputy, in entering the plaint in replevin is merely ministerial—it has, therefore, been held, that although a sheriff, or his deputy, neglects to enter a plaint in replevin, this Court

(a) See the form of this warrant, Chit. Forms, 500; and of the summons thereon, 1d.

(b) 2 Inst. 193, 140. See 2 Ro. Abr. 552; 20 H. 6, 28.

(c) *Jacob v. King*, 1 Marsh. 135, 5 Taunt. 451, S. C.

(d) See form, Chit. Forms, 301. *Gwillim v. Holbrook*, 1 B. & P. 410.

(e) *Turnor v. Turner*, 2 B. & B. 112, 4 Moore, 616, S. C.

(f) See *ante*, 578; and Vol. I, 139. See the form of the plaint, Chit. Forms, 579.

(g) *Tesseyman v. Gildart*, 1 New Rep. 292.

(h) *Ex p. Boyle*, 2 D. & R. 13.



will not compel him to do so on motion: yet, perhaps, they would grant a *mandamus* to enter the plaint (i).

The suit may be prosecuted in the county court, however considerable the value of the goods may be (j). But, if any right of freehold come in question in the course of the proceedings in the county court, or antient demesne be pleaded (k); or, if the king be a party, or the taking be in right of the crown (l), the sheriff cannot proceed in the cause; so that it is usual in practice to remove the plaint into one of the Courts at Westminster, in the first instance. So, if the defendant claim property in the goods, and on a writ *de proprietate probanda* (m) they be found to be his, the sheriff can proceed no further, but must return the proceedings into this Court or the Court of Common Pleas, to be there, if thought advisable, finally determined (n).

*Plaint, how removed.*] The plaint may be removed, by writ of *pone, recordari facias loquelam*, or *accedas ad curiam*, according to circumstances. It may be removed either by the plaintiff or defendant: by the plaintiff, at pleasure; by the defendant, upon reasonable cause (o). This assignment of cause by the defendant, however, is at present but matter of form; it is assigned in the writ of *recordari*, &c., and cannot be denied, or traversed, by the sheriff or plaintiff (p). But, where the action of replevin is commenced in a court baron, cause must be assigned for removing it, whether removed by the plaintiff or defendant (q).

If the goods have been replevied, by virtue of a *replegiari facias* (which is now rarely the case), the plaint in the county court is removed by writ of *pone* (r). This is an original writ, obtained from the cursitor, bearing *teste* after the entry of the plaint in the county court, and returnable on a general return day in term, wheresoever, &c.; but, if it happen to bear *teste* before the entry of the plaint, it is not material (s). The writ of *pone* is also the proper writ to remove all suits, which are before the sheriff, by writ of justices. In other respects, it does not differ from the writ of *recordari facias loquelam* (t).

If the goods have been replevied upon mere application to the sheriff, (as is now usually the case), without writ, the plaint is removed by writ of *recordari facias loquelam*. This is also an original writ, to be obtained from the cursitor, tested and returnable like the *pone* (u).

(i) *Ex p. Boyle*, 2 D. & R. 13; and see *Harr. L. & T.* 732.

(j) 25 H. 3, c. 21; 2 H. 7, 5 b; 2 Inst. 139.

(k) 2 Finch, L. 317; 4 H. 6, 30; 2 H. 7, 6; Co. Lit. 145.

(l) Bro. Abr. Replevin, 3.

(m) See form, Chit. Forms, 501.

(n) See *Harr. L. & T.* 739; Bac. Ab. Replevin (E) 4.

(o) F. N. B. 69 M. 70 B.

(p) *Talbot v. Binns*, 8 Bing. 71; *Parkes v. Renton*, 3 B. & Adol. 105. See form of it, Chit. Forms, 503.

(q) Reg. 85 b; F. N. B. 70 A; 2 Inst. 339, 27 H. 6, 3 b, 4 a, Doct. Pl. 356.

(r) F. N. B. 69 M.

(s) F. N. B. 71 D.

(t) *Greenw.* 22; Wats. Sheriff, 293. See forms, Chit. Forms, 503.

(u) See the form, Chit. Forms, 503.

If the plaint be levied in a court baron, it is removed by writ of *accedas ad curiam*. This is also an original writ, in every respect the same as the *recordari*, excepting that it directs the sheriff to go to the lord's court and there cause the plaint to be recorded, and so to return it to the Court above. This writ must bear *teste* after the entry of the plaint, otherwise it will be bad (x).

In no instance, where the plaint is in an inferior court not of record, should the plaint be removed by *certiorari*; for, if so removed, as the plaintiff in such case is not bound to follow the suit, the defendant could never *nonpros* him here for not declaring (y). But where the replevin suit is in an inferior court of record, it is removed by *certiorari* (z).

In order to sue out any of these writs; *make out a præcipe* (a); *take it to the cursitor, and upon telling him when the next county court will be holden, he will make out the writ. Pay him 2s. 6d. Then take it to the office of the undersheriff of the county, &c., who will allow and return it. Pay him 16s. 6d.* (b). If the sheriff return the writ *turde*, the party may sue out an *alias*, &c. (c). If to a writ of *accedas ad curiam* the sheriff return that the lord refused to hold his court, a *distingas* then issues, commanding the sheriff to distrain the lord to hold his court; and after that a *sicut alias*, &c. (d). If the sheriff do not return the *recordari*, &c., so as to enable you to file it, you should rule him to return it in the manner directed *Vol. 1, 131* (e).

*When you have got the writ returned, file it with the filacer of the county. Pay him 2s. 10d.* The writ should be returned and filed within two terms at least after the writ is returnable; otherwise the opposite party may obtain a certificate from the filacer that no such writ and return are filed, and the cursitor will thereupon issue a writ of *procedendo*, by which the cause may be removed back to and proceeded in, in the inferior court (f). Or if either party, having sued out a *re. fa. lo.*, neglect to file it, the other party, for the sake of expedition, may, without waiting till the end of the second term, sue out another writ of the same nature, and get it returned and filed, for removing the proceedings into the Court above (g). If the return, however, be filed, a writ of *procedendo* cannot, it seems, afterwards be had, unless, perhaps, where the cause was removed from a court of antient demesne (h). If not filed on the return day, a notice of its being filed should be given to the opposite party (i).

The delivery of the writ to the sheriff stays all further proceedings in the suit in the county court, even although delivered after interlo-

(x) F. N. B. 71 D. See the form, Chit. Forms, 508.

(y) *Clerk v. Mayor of Berwick*, 4 B. & Cres. 104, 7 D. & R. 104, S. C.; *Edwards v. Bowen*, 5 B. & Cres. 206, 7 D. & R. 709, S. C.

(z) Wilk. Replevin, 26.

(a) See the form, Chit. Forms, 502.

(b) See the form of the return, Chit. Forms, 504; and of the schedule to be annexed to the writ and return, Id.

(c) F. N. B. 70 B.

(d) F. N. B. 18 E.

(e) See *Bevan v. Prothesk*, 2 Bur. 1151.

(f) 2 Sellon, 162; 1 Tidd, 410. See form of *procedendo*, Chit. Forms, 506.

(g) Id.

(h) F. N. B. 69 M (a). Gilb. Replevin, 10, 11, *sed quære*.

(i) See form, Chit. Forms, 505.

cutory, provided it be before final, judgment (*k*). If the sheriff proceed further, such subsequent proceedings are void, and the sheriff is liable to an attachment (*l*). The writ, however, removes the plaintiff only, and not any of the subsequent proceedings; and the plaintiff is removed by it, although the plea in the court below may have been discontinued (*m*).

*Appearance.—Declaration.—Nonpros.*] The defendant must enter his appearance with the filacer, before the plaintiff can declare in this Court, or the defendant rule him to do so. This regularly should be done on or before the *quarto die post* of the return of the *recordari*, &c. Make out a *præcipe* for the appearance (*n*), and take it to the filacer of the proper county, who will thereupon enter the appearance; pay him 3s. 6d., and if more than one defendant, pay him 4d. for each of the others.

If the plaintiff wish to expedite the cause, and for that purpose to procure the defendant's appearance, he should obtain a rule to appear from the filacer (*o*); pay him 4s. 3d.; enter it with the clerk of the rules, and serve a copy of it upon the defendant. This rule expires in four days; and if the defendant have not entered his appearance within that time, then, if the plaintiff have been removed by the plaintiff by *pone* or *recordari*, sue out a *pone per vadios* with the filacer (*p*); pay signing, 5s. 6d., sealing 7d.; upon which the sheriff will summon the defendant (*q*). On the *quarto die post* of the return day of the *pone*, search with the filacer if the defendant have entered an appearance; and if not, the filacer will make out a *distringas* (*r*) upon your furnishing him with a *præcipe*; pay 2s. 10d. signing, 7d. sealing. This is a judicial writ, commanding the sheriff to distrain the defendant by all his goods and chattels, so that he be before the king on a general return day, wheresoever, &c., to answer the plaintiff of a plea of, &c. (*s*). It must bear teste in term time, be returnable on a general return day, in the same or in the next term, and have 15 days between the teste and return. Care must be taken that the defendant be correctly named in the writ, otherwise the sheriff will not be justified in executing it (*t*). Take this writ to the sheriff's office, and obtain a warrant thereon; pay 2s. 6d.; give the same to your officer, who will thereupon levy the sum of 40s. (*u*). If the defendant have not entered an appearance on the *quarto die post* of the return of the *distringas*, get the writ returned, and sue out an *alias*, and after that a *pluries*; or if the sheriff return *nulla bona*, you may sue out a *testatum distringas* into a different county (*x*). Upon suing out the

(*k*) *Bevan v. Protheske*, 2 Bur. 1151.

(*l*) F. N. B. 4 E.

(*m*) F. N. B. 71 A.

(*n*) See form of the *præcipe* for appearance, Chit. Forms, 506.

(*o*) See Chit. Forms, 506.

(*p*) See the form, Chit. Forms, 507.

(*q*) See the form of the summons, Chit. Forms, 507.

(*r*) See the form, Chit. Forms, 507.

(*s*) See the form, *Id.*

(*t*) *Cole v. Hindson*, 6 T. R. 234.

(*u*) See *Bloxam v. Surtees*, 4 East, 162.

(*x*) *Id.* See the form of the *alias* and *pluries*, Chit. Forms, 507, and of the *testatum*, Arch. Forms, 451.

*alias*, move the Court to increase the issues, who will thereupon grant a rule absolute in the first instance; draw up the rule with the clerk of the rules (y), annex a copy of it to the *alias distringas*, and leave it with the sheriff to be executed, as above directed. If upon the *quarto die post* of the return of this writ, the defendant have not entered an appearance, sue out a *pluries distringas*, and again move the Court to increase the issues, which they will now order to the amount of the debt and costs; draw up the rule, and get the writ executed, as above directed. If, on the *quarto die post* of this writ, the defendant have not appeared, then in pursuance of stat. 10 G. 3, c. 50, move for a rule to shew cause "why the issues returned upon the several writs of *distringas* should not be sold, and the monies arising from the sale thereof should not be forthwith brought into Court; and why it should not be referred to the Master to tax the plaintiff his costs, occasioned by his issuing out the said several writs; and why such costs, when taxed, should not be paid out of the monies so brought into Court; and why the surplus of the said monies, after payment of the said costs, should not be retained in Court, until the purpose of the said writs be answered" (z). Move this upon an affidavit, stating the issuing and returns of the writs of *distringas*, and that the defendant has not appeared (a). Draw up the rule, and serve a copy of it upon the sheriff. Afterwards move to make the rule absolute; draw up the rule, and serve a copy on the sheriff, at the same time shewing the original; and if he do not pay the money into court, move for an attachment. If the money be paid in, make out a bill of costs and get it taxed; then take the rule and allocatur to the signer of the writs, and he will pay you the amount of the costs (b). You may afterwards proceed by *distringas* thus *ad infinitum*, applying from time to time to sell the issues for payment of costs, until the defendant appear (c); but if *nulla bona* be returned to the *distringas*, then sue out a *capias*, and so proceed to outlawry (d). If the plaint, however, have been removed by the defendant (e), or by the plaintiff by writ of *accedas ad curiam* (f), the first process after the rule to appear is the *distringas*, omitting the *pone per vadios*. If the defendant come in upon any of these writs, and enter his appearance with the filacer, the plaintiff may then deliver or file his declaration, as in ordinary cases (g).

But if the defendant wish to expedite the cause, then on or after the *quarto die post* of the return of the *recordari*, having first entered an appearance with the filacer, as directed ante, 582, get a rule to declare from the master; (R. H. 2 W. 4, r. 38) (h); and serve a copy of it upon the plaintiff, or upon his attorney or agent, if the cause were removed

(y) See the form, Arch. Forms, 451.

(z) See as to the form of the rule, Arch. Forms, 452.

(a) See the form, Arch. Forms, 451.

(b) See *Martin v. Townsend*, 5 Bur. 2725.

(c) See form of *alias* and *pluries*, Chit. Forms, 507.

(d) F. N. B. 70 A (a). See form of

*capias*, Chit. Forms, 500.

(e) F. N. B. 70 A (a).

(f) *Thompson v. Jordan*, 2 B. & P. 137.

(g) See form of declaration, Chit. Forms, 519. See *Topping v. Fuge*, 5 Taunt. 771, 1 Marsh. 341, S. C.

(h) See the form, Chit. Forms, 509.

by him. Such rule may be given within four days after the end of the term in which the writ is returned (a). The plaintiff may, as in other cases, obtain a rule for time to declare, see *ante*, Vol. 1, 187, and the Court will not, it seems, set the rule aside, and compel the plaintiff to declare sooner in this form of action any more than in another (b). In order to obtain a judgment of *nonpros* for not declaring, in addition to the above rule to declare, a written demand of declaration should be served on the plaintiff or his attorney or agent, (as the case may be); and if four days after the service of such rule and the making of such demand have severally expired, and the plaintiff has not declared, the defendant may sign judgment of *nonpros* (c). Sign such judgment as directed, *post*, Book 4, Part 1, Chap. 17. Where a replevin suit was removed from an inferior jurisdiction into this Court by *certiorari*, and the defendant signed judgment of *nonpros* for not declaring, the Court held the judgment irregular, and refused to refer it to the master to tax the defendant his costs, on the ground of the distinction between a *re. fa. lo.* and a *certiorari*, the former giving a day to the parties to appear in Court, the latter none (d).

The judgment of *nonpros* at common law is, that the defendant shall have a return of the goods replevied, and his costs (e). The plaintiff, however, is not prevented by this judgment from proceeding; for he may sue out a writ of second deliverance (f); in execution of which, the sheriff must again take the goods from the defendant and deliver them to the plaintiff; or the writ will operate in the sheriff's hands as a *supersedeas* of the writ *de retorno habendo*, if the latter writ have not as yet been executed (g). If the plaintiff intend to proceed thus, let an award of the writ of second deliverance be entered upon the roll after the judgment of *nonpros* (h). Then sue out the writ with the *cursor* (i). The proceedings upon this writ are the same as in ordinary cases of replevin, where the action is commenced by writ, as already mentioned; and if the defendant have judgment, either upon verdict, demurrer, or of *nonpros*, it is for a return irreplevisable, and he shall have a writ *de retorno habendo* (k); which being executed, the plaintiff cannot have any further writ of deliverance. But if the plaintiff do not sue out a writ of second deliverance, and to the writ *de retorno habendo* the sheriff should return that the goods, &c., are eloiigned (l), the defendant shall then have a *capias in withernam* (m), and after that an *alias* and *pluries*, until it is executed (n). The *capias in withernam*, however, in this case, is but mesne pro-

(a) R. H. 2 W. 4, r. 37. Formerly the rule might have been given in 14 days after term. 11 East, 183.

(b) *Craven v. Vavasour*, 5 Taunt. 35.

(c) F. N. B. 70 A.; R. T. 1 W. 4; *Edwards v. Drunch*, 11 East, 183.

(d) *Clerk v. Mayor of Berwick*, 4 B. & Cres. 649.

(e) See the form, Chit. Forms, 510; and see form of writ *de retorno habendo* thereon, Id. 511; and of *fi. fa.* or *ca. sa.*

for the costs, Id.

(f) 2 Inst. 340; Stat. Westm. 2, c. 2.

(g) Latch, 72; Palm. 403; *Pratt v. Rutledge*, 1 Salk. 95.

(h) See form of it, Chit. Forms, 511.

(i) See form, Chit. Forms, 512; and return thereto, Id.

(k) 2 Inst. 341.

(l) See form, Chit. Forms, 512.

(m) Id.

(n) See the form, Chit. Forms.

cess, to compel the plaintiff to declare (o); and as soon as he has declared, he may, it seems, obtain a restitution of the goods taken under it, upon motion (p).

But in cases where the replevin is of goods distrained for rent, if the plaintiff be *nonprossed*, the defendant, after entering the judgment for a return (and which must still be entered, although it is never executed) (q), may, by 17 C. 2, c. 7, s. 2, make a suggestion on the roll, in the nature of an avowry or conusance, and pray a writ of inquiry to be directed to the sheriff of the county where the distress was taken, to inquire of the rent in arrear at the time of the distress, and also of the value of the distress. Then follows on the roll the award of the writ of inquiry (of the execution of which fifteen days' notice must be given to the plaintiff or his attorney; (17 C. 2, c. 7, s. 2) (r); then the sheriff's return of the finding of the inquest; and, lastly, follows an entry of the final judgment. If the inquest find the value of the distress to be as much or more than the amount of the arrears of rent, then the final judgment shall be, that the defendant recover the amount of such arrears, and full costs of suit; but if the distress be less than the arrears, then the judgment shall be for the sum at which the distress is valued by the inquest, together with full costs of suit. (17 C. 2, c. 7, s. 2) (s). The defendant may have execution of this judgment, by *fieri facias*, *ca. sa.*, or *elegit* (17 C. 2, c. 7, s. 2); but cannot, of course, have a writ *de retorno habendo* (t). This statute does not take away or alter the judgment at common law, it only gives a further remedy to the avowant: and it is always at the election of the defendant, whether he will proceed under the statute or not (u). This mode of proceeding by writ of inquiry under the statute, is in many cases advisable, as a writ of second deliverance after it would be inoperative, the goods still remaining with the plaintiff (x). The Court in some cases, under particular circumstances, will set aside this judgment of *nonpros*, &c., and let in the plaintiff to declare, upon payment of costs (y).

Or, instead of executing a writ of inquiry, under this statute, the defendant, having signed judgment of *nonpros*, in cases where the replevin is of a distress for rent, may take an assignment of the replevin bond, and proceed upon it against the plaintiff and his pledges (z).

As to the mode of framing the declaration in general, see 2 Chit. Pl. 843, 1 *Id.* 189. The declaration in replevin, where the suit is re-

(o) *Moor v. Watts*, 1 Ld. Raym. 614, 12 Mod. 423, S. C.

(p) *Noy*, 50; and see Comb. 201; *Moor v. Watts*, 2 Salk. 582.

(q) See *Cooper v. Sherbrooke*, 2 Wils. 117; *Barnes*, 427, S. C.; *Carth.* 253.

(r) See *Burton v. Hickey*, 6 Taunt. 57, 1 Marsh. 444, S. C.

(s) See the forms of suggestion, &c., and judgment, Chit. Forms, 513; of writ of inquiry, *Id.* 515; of notice of inquiry, *Id.* 516; of inquisition thereon, *Id.* 517; and of entry thereof upon the

roll, *Id.*

(t) See the forms of the *fi. fa.* and *ca. sa.*, Chit. Forms, 518.

(u) *Rees v. Morgan*, 3 T. R. 350.

(x) *Playters v. Sheering*, 1 Vent. 64; *Bul. N. P.* 58; *Cooper v. Sherbrooke*, *Barnes*, 427, 2 Wils. 116, S. C.

(y) *Playters v. Sheering*, 1 Vent. 64.

(z) See Chit. Forms, 499; and see *Turner v. Turner*, 2 B. & B. 107, 4 Moore, 606, S. C.; *sed vide* 2 Tidd, 1056.

moved by *re. fa. lo.*, must be intitled either of the term in which the writ is returnable, or of that in which it is delivered. If it be intitled of an intermediate term, judgment for want of a plea will, it seems, be set aside (a).

*Avowry.*] When the plaintiff has delivered or filed his declaration, let him give a notice to the defendant to avow in the manner directed, Vol. 1, p. 193, 195, as to the notice to plead: also let him enter a rule to avow with the clerk of the rules, in the manner directed, Vol. 1, p. 196, as to the rule to plead (b). Then demand an avowry, in the same manner you demand a plea; (see Vol. 1, p. 197) (c); and if the defendant do not file his avowry or consurance, &c. with the clerk of the papers, within the time limited for that purpose, sign judgment by default, and execute a writ of enquiry, as directed, ante, 505, 513(d). It should seem that the enactment of 2 W. 4, c. 39, s. 11, as to pleading between the 10th August and 24th October, and the rule of M. T. 3 W. 4, r. 12, framed to meet it (ante, Vol. 1, p. 195), do not apply to proceedings in replevin.

If the defendant plead, avow, or make consurance, let the plea or avowry, &c., if it conclude with a verification, be signed by counsel, and filed with the clerk of the papers. If he plead or avow double, first obtain a Judge's order for that purpose, as directed Vol. 1, 208. The pleading a double plea, avowry, or consurance, without a rule for that purpose, would entitle the plaintiff to sign judgment. (R. H. 2 W. 4, r. 34). The plea of *cepit in alio loco* is not a plea in abatement but a plea in bar; and therefore an affidavit to verify it is not required (e).

As regards the time for avowing or making a consurance, &c. the notice must be to avow, &c. within four days, if the venue be laid in London or Middlesex, and the defendant reside within twenty miles of London; or within eight days, if the venue be laid in any other county, or the defendant reside above twenty miles from London (f); and in default of avowry, &c. the plaintiff may sign judgment. (R. T. 5 & 6 G. 2). In some cases, however, the defendant is entitled to what is termed an *imparlance*, or, in other words, to a further time to plead, and which shall be now noticed.

*Imparlance.*] An *imparlance*, or *licentia loquendi*, is a leave given by the Court to the defendant, to speak with the plaintiff, to see if they can end the matter in dispute, amicably, without suit, if possible (g). But, in effect, it is time given to the defendant to plead.

As regards the time given by this *imparlance*, before the recent rules of T. T. 1 W. 4, and H. T. 2 W. 4, r. 3, if the process were return-

(a) *Topping v. Fuge*, 5 Taunt. 771.  
See form of declaration, Chit. Forms, 519.

(b) See Chit. Forms, 109.

(c) Id.

(d) See as to the forms of the judg-

ment, &c. Chit. Forms, 519, 520.

(e) *Bullythorpe v. Turner*, Willes, 475.

(f) Ante, Vol. 1, 194.

(g) 3 Bl. Com. 298.

able on or after the last general return of the term, (*see R. T. 5 & 6 G. 2; R. T. 22 G. 3*), or if the plaintiff had neglected to deliver his declaration, or to file it and give notice thereof, four days exclusive before the end of the term in which the process was returnable, (*see R. T. 5 & 6 G. 2, b; R. T. 22 G. 3*), the defendant was entitled to an imparlanee over to the next term after that in which the declaration was delivered or filed, and must have pleaded within the first four days thereof (*h*). But now, by the rule of *T. T. 1 W. 4*, it is ordered, that, upon every declaration delivered or filed on or before the last day of the term (*i*), the defendant, whether in or out of any prison, shall be compellable to plead as of such term without being entitled to any imparlanee. And by the more recent rule of *H. T. 2 W. 4, r. 3*, in Hilary and Trinity terms, the plaintiff, in a *country* cause, may declare *de bene esse*, within four days after the end of the term as of such term. If not delivered or filed within this time, then it must be delivered or filed before the first day (*k*) of the subsequent term, or the defendant will be allowed to imparl to the third or subsequent term, and shall plead within the first four days thereof (*l*). But where the defendant does not appear on or before the last day of a term, he is not entitled to an imparlanee over to the third term, although the plaintiff do not declare before the first day of the second term: for the plaintiff cannot in replevin, nor is he obliged in any case to declare until the defendant is fully in Court, and no laches can consequently be imputed to him for not declaring, until after that time (*m*). For the same reason, if a joint writ issue against two defendants, and they appear in different terms, neither can claim an imparlanee upon the ground of the plaintiff's not having declared in the term in which the first defendant appeared; for he could not, in fact, have declared until both the defendants were before the Court (*n*). Also, for the same reason, where the plaintiff is prevented from declaring the same term the writ is returnable, by his being obliged to proceed to outlawry against some of the defendants, the others who have been served or arrested are not entitled to an imparlanee (*o*). So, if, by any other act of the defendant's, the plaintiff is prevented from declaring in time, the defendant shall not be entitled to an imparlanee (*p*).

If the defendant plead without imparlanee, and his plea be a nullity,

(h) 2 Saund. 2.

(i) See *Edensor v. Hoffman*, 2 C. & J. 140.

(k) Before the 1 W. 4, c. 70, it must have been so filed or delivered before the essoign day; but that act, it seems, has done away with that day for all purposes, as part of the term. See *Price v. Hughes*, 1 Dowl. P. C. 448.

(l) 2 Saund. 2. See *Whalley v. Barnett*, 1 Dowl. P. C., 607.

(m) *Smith v. James*, 6 T. R. 752; *Wood v. Wenman*, 1 Wils. 154; *Winter v. Barnes*, 9 D. & Ry. 18; *Rolleston v.*

*Scott*, 5 T. R. 372; *Cook v. Allen*, 1 C. & M. 350; and see *Bailey v. Hunter*, 2 B. & P. 126; *sed vide Thompson v. Jordan*, 2 B. & P. 137.

(n) Tidd, 9th ed. 467; *Res v. Sheriffs of London*, in *Day v. Morley*, 1 Chit. Rep. 359. See *Smith v. Muller*, 3 T. R. 626, 627.

(o) *Martin v. Bradley*, F. 18 G. 3; *Codwin v. Seaman*, M. 1797; MS. B. 1211.

(p) *Page v. Vogel*, 2 B. & Ald. 390, 1 Chit. Rep. 230, S. C.; *Rooke v. Leicester*, *Earl of*, 2 T. R. 16.



so that the plaintiff signs judgment for want of a plea, the Court will not set aside the judgment for being signed too soon; for, by pleading, the defendant waived his right to an imparlance (*q*). Taking out a summons for time to plead, upon which the plaintiff indorses his consent, or obtaining an order thereon, is a waiver of the right to an imparlance (*r*).

The imparlance thus obtained is a *general* imparlance; but the defendant may have a *special* imparlance, when necessary, by leave of the Court obtained by a side bar rule for that purpose (*s*); or a *general special* imparlance, under particular circumstances, by moving the Court for it within the first four days of the next term (*t*).

The *general imparlance* is a leave to imparl generally to the next term, without any saving of exceptions; and may be entered as of course, in all cases where the defendant is entitled to it (*u*). After a *general* imparlance, the defendant can plead only in bar, and not in abatement (*w*); or to the jurisdiction, or any other dilatory plea; nor can he claim consuance or demandoyer (*x*). Formerly, it was holden that he could not plead a tender; although latterly the law has been considered to be otherwise (*y*); still, however, it seems, a rule of court or a judge's order must be obtained for leave to plead it as of the preceding term (*z*); so that, upon the face of it, it may not appear to be pleaded after an imparlance. But if a declaration be filed or delivered so late that the defendant is not bound to plead until the next term, the defendant *may plead as of the preceding term*, within the first four days of the next term, any plea to the jurisdiction or in abatement, or a tender, or any other similar plea (*a*).

The *special imparlance* contains a saving of all exceptions to the writ, bill, or count (*b*); and is necessary where the defendant intends to plead in abatement, of a term subsequent to the declaration (*c*). It cannot be had without leave of the Court (*R. E. 5 A.*) obtained by a side bar rule for that purpose (*d*). After a *special* imparlance the defendant cannot plead to the jurisdiction, or a plea of privilege; but he must obtain a *general special imparlance* to enable him to do so (*e*).

The *general special imparlance* contains a saving of all advantages and exceptions whatsoever. The entry of it is the same as that of the *special* imparlance, excepting that instead of the saving in the

(*q*) *Lockhart v. Mackreth*, 5 T. R. 661.

(*r*) *Edensor v. Hoffman*, 2 C. & J. 140.

(*s*) R. E. 5 A.; 2 Saund. 2 a.

(*t*) 2 Saund. 2 ab; Tidd, 9th ed. 467.

(*u*) See the form of entering it, Arch. Forms, 91.

(*w*) *Lloyd v. Williams*, 2 M. & Sel. 484; *Buddle v. Willson*, 6 T. R. 369.

(*x*) 2 Saund. 2.

(*y*) 1 Saund. 33 b; 2 Saund. 2.

(*z*) *King v. Nichols*, Barnes, 343, 347, 349; and see *Kilwick v. Maidman*, 1

Bur. 59.

(*a*) R. H. 2 W. 4, r. 45; 1 Salk. 367.

(*b*) See the form of entering it, Arch. Forms, 288, 289.

(*c*) 2 Saund. 2; *Doughty v. Lascelles*, 4 T. R. 520; *Blackmore v. Flemming*, 7 Id. 447, n.

(*d*) See the form of the rule, Arch. Forms, 287.

(*e*) 2 Saund. 2 b; *Godefroy v. Jay*, 6 Bing. 616, 1 M. & P. 440, S. C. The Court, in the last case, thought the plaintiff ought to have demurred, and not signed judgment for want of a plea.

latter, you insert the words "saving to himself all advantages and exceptions whatsoever." This kind of imparlance is necessary, where the defendant intends to plead to the jurisdiction (*f*), or to plead his privilege (*g*), of a term subsequent to the declaration. It is obtained by application to the Court, within the first four days of the next term. It is in the discretion of the Court, however, governed by the particular circumstances of the case, to grant it, or not (*h*); they will not grant it, for instance, if the defendant have appeared by attorney (*i*), because a plea to the jurisdiction must be pleaded in person.

If the defendant plead in abatement after the general imparlance, or to the jurisdiction after a special imparlance, the plaintiff may either sign judgment (*j*), (except in a questionable case (*k*),) or apply to the Court to set aside the plea (*l*), or may demur generally (*m*), or may allege the imparlance in his replication, by way of estoppel (*n*); but if, instead of doing so, the plaintiff reply to the plea, the fault is cured (*o*). Or, if the imparlance be obtained irregularly,—as, if a special imparlance be entered, without a side bar rule first obtained for that purpose,—or a general special imparlance, without leave first obtained of the Court upon motion, it should seem that the plaintiff may sign judgment (*p*).

*Plea in bar.*] As soon as the defendant has avowed, &c., he may rule the plaintiff to plead, in the same manner as directed Vol. 1, 211, as to the rule to reply; and if the plaintiff do not plead within the time limited by the rule, the defendant may sign judgment of *nonpros*. It should seem that the enactment of the 2 W. 4, c. 39, s. 11, as to pleading between the 10th August and 24th October, and the rule of M. T. 3 W. 4, r. 12, framed to meet it, (*ante*, Vol. 1, p. 195), do not apply to proceedings in *replevin*.

The judgment of *nonpros* in this case, at common law, is, that the defendant shall have a return of the goods (*q*). But, if the distress were for rent, customs, services, or damage feasant, the defendant shall have judgment for his damages; (21 H. 8, c. 19); and, consequently, after the entry of the judgment of *nonpros* on the roll, follow the award of a writ of inquiry to ascertain the damages (in the same manner as in ordinary cases upon a judgment by default), the sheriff's return of the inquest, and final judgment (*r*). In this case,

(*f*) 2 Saund. 2 b.

(*g*) Hardr. 365; 1 Lutw. 46; 12 Mod. 529; Gilb. C. B. 210, 211.

(*h*) 2 Saund. 2 b.

(*i*) *Grant v. Sordes*, 2 W. Bl. 1094; 2 Saund. 2 b.

(*j*) *Doughty v. Lascelles*, 4 T. R. 520; *Blackmore v. Fleming*, 7 T. R. 447, n.

(*k*) *Godfrey v. Jay*, 4 M. & P. 440, 6 Bing. 616, S. C.

(*l*) 2 Saund. 3; *Buddle v. Willson*, 6 T. R. 373.

(*m*) *Lloyd v. Williams*, 2 M. & Sel. 484; *Buddle v. Willson*, 6 T. R. 369.

(*n*) Clift. 18 pl. 46, 19 pl. 50, 20 pl. 53,

VOL. II.

54; 1 Lutw. 23.

(*o*) 1 Vent. 236.

(*p*) See 2 Saund. 2 b.

(*q*) See the form, Chit. Forms, 523; and of writ of *retorno habendo* thereon, Id. 524; and of *fi. fa.* or *ca. sa.* for costs, Id. 525.

(*r*) See the forms, Chit. Forms, 525; of writ of inquiry thereon, Id. 526; of notice of inquiry, Id.; of inquisition, Id.; of entry thereof upon the roll, Id.; of writ of *retorno habendo* thereon, Id.; and of *fi. fa.* or *ca. sa.* for damages and costs, Id.

also, the plaintiff may sue out a writ of second deliverance (s); but it will be a supersedeas of the writ *de retorno habendo* only, and not of the writ of inquiry (t).

Or, if the replevin were of a distress for rent, the defendant may enter his judgment, and execute a writ of inquiry, under stat. 17 C. 2, c. 7, s. 2, in the manner directed, *ante*, 585, for want of a declaration, excepting that the entry of a suggestion, in nature of an avowry, must, of course, be omitted; and you, therefore, enter the prayer for the writ of inquiry, &c., immediately after the judgment for a return (u).

Or the defendant, instead of executing a writ of inquiry, may, after signing judgment of *nonpros*, take an assignment of the replevin bond, and proceed thereon (v).

If the plaintiff plead to the avowry or conusance, *let the plea, if it conclude with a verification, be signed by counsel; engross it on plain paper, and file it with the clerk of the papers (w)*. If the plaintiff plead double (which he may do, 4 A. c. 16, s. 4), a Judge's order must first be obtained for that purpose, as directed, Vol. 1, 209; and, if he pleaded double without a rule for that purpose, defendant might sign judgment of *nonpros*. (*Id. R. H. 2 W. 4, r. 34*).

*Issue.*] Let the paper book be drawn up, delivered, and returned, as directed, Vol. 1, 214, 218, 219; but let the form of it be as directed, *ante*, 545, with reference to proceedings by original, in ejectment, &c. (x). Either plaintiff or defendant may make it up, and enter it when necessary, both parties in replevin being deemed actors. (Vol. 1, 219).

*Demurrer.*] The proceedings upon demurrer are the same as in ordinary cases; the only thing necessary to be mentioned here is the judgment. At common law, the judgment for the defendant is, that he have a return of the goods irreplevisable (y). But, if the distress were for rent, customs, services, or damage feasant (21 H. 8, c. 19), an inquiry of damages and costs is awarded (z). The defendant thereupon sues out a *retorno habendo*, and an inquiry of damages, either in the same writ (a), or in separate writs (b); and, upon the return of the writ of inquiry, final judgment is entered to recover, as well the damages and costs assessed by the jury, as the costs assessed by the Court (c). No writ of second deliverance lies after judgment upon demurrer.

(s) See form, Chit. Forms, 512.

(t) Latch, 72; Palm. 403; Pratt v. Rutledge, 1 Salk. 95.

(u) See the form of the entry, Chit. Forms, 528; and of writ of inquiry, *Id.*; of notice of inquiry, *Id.*; of the inquisition, *Id.*; of entry thereof upon the roll, *Id.*; and of *fi. fa.* or *ca. sa.* thereon, *Id.*; and see *Turnor v. Turnor*, 2 B. & B. 107, 4 Moore, 606, S. C.

(v) *Waterman v. Yea*, 2 Wils. 41; *Turnor v. Turnor*, 2 B. & B. 170, 4 Moore, 606, S. C.; *ante*, 585.

(w) See form, Chit. Forms, 529.

(x) See as to the form, Chit. Forms, 534.

(y) 14 H. 7, 6 b.; 2 Inst. 340; Co. Ent. 591 a.; and see the form, Chit. Forms, 529.

(z) See as to the form, Chit. Forms, 529.

(a) See the form, Thes. Brev. 220.

(b) See the forms, Lil. Ent. 600; Chit. Forms, 530.

(c) 1 Saund. 195 n.

Or, if the distress were for rent, then, after judgment given for the avowant, or person making conusance, the Court may award a writ of inquiry, to inquire of the value of the distress (of the execution of which writ of inquiry, fifteen days' notice must be given to the plaintiff's attorney or agent) (c); and, upon the return thereof, if the value of the distress be greater than the amount of the rent in arrear, the defendant shall have judgment to recover the arrears, and full costs; but, if the value of the distress be less than the arrears, then he shall have judgment to recover the value of the distress, and full costs. (17 C. 2, c. 7, s. 3) (d). The stat. 17 C. 2, c. 7, s. 3, does not require, in this case, that the inquiry shall be as to the arrears of rent (e). In this case, no writ *de retorno habendo* issues.

The judgment for plaintiff, on demurrer, is the same as in the action of trespass. (See *ante*, 480).

*Staying proceedings—Payment into Court—Discontinuing—Withdrawing plea in bar, &c.*] If the defendant avow or make conusance for rent, the Court, upon application by the plaintiff, will stay the proceedings, upon the rent and all the costs up to that time being paid into Court (f). But they will not do so, where the damages are unliquidated, as, where the defendant avows, &c. for damage feasant (g).

If the grantee of a rent-charge avow upon several under tenants for the same rent, the Court will, upon a tender pleaded by the under tenants, make an order, that the payment of the rent into Court in one action shall serve for all (h). Although a party cannot proceed for damages on a plea of tender, after taking the money out of Court; yet, on a plea of tender to an avowry for rent, the plaintiff need not bring the money into Court (i).

Upon the application of the defendant, also, the Court have stayed the proceedings, upon payment of the costs of the action and of the costs of replevyng, and upon giving up the replevin bond, where no special damage was laid in the declaration (j).

The defendant cannot have a rule to discontinue, &c., for though he be an actor in the suit, yet still it is the plaintiff's suit (k). The Court will not, after issue joined upon a plea in bar, suffer the plea to be withdrawn, and the avowry confessed, without consent, for, the avowant would lose his costs (l).

*Trial, &c.*] After giving notice of trial, the plaintiff (or if he neglect to do it, the defendant) may make up the *Nisi Prius* record, as directed, *ante*, 546, with reference to proceedings in ejectment by ori-

(c) *Burton v. Hickey*, 1 Marsh. 444, 6 Taunt. 57, S. C.

(d) See the forms, Chit. Forms, 531, 533; and see 1 Saund. 195; 2 Id. 286.

(e) See 2 Saund. 286.

(f) *Vernon v. Wynne*, 1 H. Bl. 24; *Hopkins v. Shrole*, 1 B. & P. 382; and see *Davis v. Prince*, Barnes, 429.

(g) *Anon.* 8 Mod. 379.

(h) *Anon.* 1 Ld. Raym. 429.

(i) Bull. N. P. 60; Woodf. L. & T. by Harrison, 769.

(j) *Banks v. Brand*, 3 M. & Sel. 525. See *Hodgkinson v. Snibson*, 3 B. & P. 603, *cont.*

(k) *Long v. Buckeridge*, 1 Stra. 112.

(l) Com. Dig. Pleader, 3 K. 20.

ginal, and sue out jury process, enter the cause for trial, and proceed to verdict or nonsuit, as in ordinary cases (*m*). Inasmuch as both parties in *replevin* are deemed actors, when the record is carried down for trial by the defendant, it is not necessary to have the proviso in the *distringas*, as in cases of trial by proviso (*n*), although, in practice, it is usually inserted (*o*). For the same reason, the defendant, in *replevin*, cannot have judgment as in case of a nonsuit (*p*); but, if either plaintiff or defendant give notice of trial, and afterwards do not proceed to try the cause, or countermand their notice in time, the opposite party will be entitled to costs, as in ordinary cases. (See Book 4, Part 1, Chap. 23, 24).

If a verdict be found for the plaintiff, the jury assess the damages (*q*) as in a verdict for plaintiff in trespass, &c. (*r*). If it be found for the defendant, the jury, at common law, find the issues specially for the defendant; and the judgment is, that he have a return of the goods irreplevisable (*s*). But, if the distress were for rent, customs, services, or damage feasant, then the jury may assess damages for the defendant; (7 *H.* 8, c. 4, s. 3; 21 *H.* 8, c. 19, s. 3); and the judgment then is, not only for a return of the goods, but for the damages and costs also (*t*). Or, if the distress were for rent, and the defendant wish that the finding should be according to 17 *C.* 2, c. 7, s. 2, the jury find the amount of the rent in arrear, and the value of the things distrained; and the defendant shall have judgment accordingly (*u*). If the jury, in finding a verdict generally for defendant, omit to assess damages according to these statutes of *Hen.* 8, the omission may be supplied by a writ of inquiry (*x*). But, if the jury find, according to stat. 17 *C.* 2, c. 7, s. 2, an omission in their verdict cannot be supplied by such writ (*y*); although, in such a case, the Court would probably allow the defendant to enter his judgment for a return at common law, or allow him to amend it, if already entered (*z*); or, if the jury have assessed damages, but not the amount of the rent, the defendant may have leave to enter his judgment, as a judgment under stat. 21 *H.* 8, c. 19 (*a*).

(*m*) See, as to the form of *Nisi Prius* record, Chit. Forms, 535; and of jury process, *Id.*

(*n*) *Reg. v. Banks*, 2 Salk. 652.

(*o*) *Jones v. Concannon*, 3 T. R. 661; *Eggleston v. Smart*, 1 W. Bl. 375.

(*p*) *Jones v. Concannon*, 3 T. R. 661; *Shortridge v. Hiern*, 5 T. R. 400; *Eggleston v. Smart*, 1 W. Bl. 375.

(*q*) Usually, no more than the costs of the *replevin* bond (about 4*l.* 4*s.*) are given as damages.

(*r*) See form of the *postea*, Chit. Forms, 536; of the judgment and execution, *Id.*

(*s*) See the forms of *postea*, &c., on this verdict, Chit. Forms, 536, 537.

(*t*) See form of *postea*, Chit. Forms, 537; judgment, *Id.* 538; writ *de retorno habendo*, *Id.*; *fi. fu.* or *ca. sa.* for damages and costs, *Id.* 540.

(*u*) See form of *postea*, Chit. Forms, 540; judgment, *Id.* 541; and execution, *Id.* See *Turnor v. Turner*, 2 B. & B. 107, 4 Moore, 606, S. C.

(*x*) *Herbert v. Waters*, Carth. 362, 1 Salk. 205, S. C.; *Pratt v. Rutledge*, *Id.* 95; *Harcourt v. Weeks*, 5 Mod. 77; *Davell v. Marshall*, 2 W. Bl. 921, 3 Wils. 442, S. C.

(*y*) *Sheape v. Culpeper*, 1 Lev. 255, 1 Sid. 380, T. Raym. 170, 1 Vent. 40, S. C.; *Herbert v. Waters*, 1 Salk. 205, 2 Ld. Raym. 59, S. C.; *Kinaston v. Mayor of Shrewsbury*, Hardw. 297, 2 Str. 1052, S. C.; *Rees v. Morgan*, 3 T. R. 349. See *Freeman v. Archer*, 2 W. Bl. 763.

(*z*) *Rees v. Morgan*, 3 T. R. 349; *Herbert v. Waters*, Carth. 362; *Sheape v. Culpeper*, *supra*, n. (*y*).

(*a*) *Gamon v. Jones*, 4 T. R. 509.

*Nonsuit.*] If the plaintiff be nonsuit, the defendant, at common law, has judgment to have a return of the goods (b). But, if the distress were for rent, customs, services, or damage feasant, then the jury may inquire of the defendant's damages; (21 H. 8, c. 19, s. 3); and the judgment is then, not only for a return of the goods, but for the damages and costs also (c). Or, if the distress were taken for rent, then, at the prayer of the defendant, the jury shall inquire of the amount of the arrears, and the value of the distress (17 C. 2, c. 7, s. 2), in the same manner as where a verdict is given for the defendant; and he shall have judgment to recover the arrears and his costs, if the value of the distress be found to equal or exceed such arrears; but, if the value of such distress do not equal the arrears, then he shall have judgment to recover the value of the distress and his costs. (*Id.*) (d).

As the judgment at common law, in this case, is not for a return of the goods *irreplevisable*, the plaintiff may sue out a writ of second deliverance, and proceed upon it, as mentioned, *ante*, 584. This writ will be a supersedeas of the writ *de retorno habendo*; but, the defendant is not precluded by it from levying the damages and costs awarded to him by the judgment.

*New trial.*] In *replevin*, where the verdict is for the plaintiff, the Court will not, in general, grant a new trial, even on payment of costs, without very clear grounds; for, the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying double costs (e). See further as to new trials, *post*, Book 4, Part 1, Chap. 27.

*Costs.*] If the plaintiff have a verdict, he is entitled to costs of increase, by the stat. of Gloucester (6 E. 1, c. 1, s. 2), in the same manner as in all other actions in which a plaintiff recovers damages (f).

So, if the defendant, in *replevin*, or second deliverance, making avowry, conusance, or justification for rents, customs, or services, or for damage feasant, have a verdict, or the plaintiff be nonsuit, or otherwise barred, he is entitled to costs, by 7 H. 8, c. 4, s. 3, and 21 H. 8, c. 19, s. 3 (g). And by 17 C. 2, c. 7, s. 2, in *replevin* of a distress for rent, if the defendant have judgment upon this act, he shall have full costs of suit. And, lastly, where the distress is for rent, relief, heriot, or other service, (not a rent charge) (h), the defendant

(b) See form of the *postea*, judgment, and writ *de retorno habendo*, Chit. Forms, 541, 542.

(c) See form of *postea*, Chit. Forms, 542, 543; judgment, *Id.*; and execution, *Id.*; and see *Turnor v. Turner*, 2 B. & B. 107, 4 Moore, 606, 616, S. C.

(d) *Id.*

(e) *Parry v. Duncan*, 7 Bingh. 243.

(f) See *Butterton v. Furber*, 1 B. & B.

517, 4 Moore, 296, S. C.

(g) See Hardw. 153; *Smith v. Walker*, 2 Ld. Raym. 788, Com. 122, S. C.; *Haselop v. Chaplin*, Cro. El. 330; *Samuel v. Hoder*, Cro. Jac. 520; *Porter v. Gray*, Cro. El. 301; *Davies v. James*, 1 T. R. 371.

(h) *Leominster Canal Company v. Cowell*, 1 B. & P. 213, 7 T. R. 500, S. C.

avowing, or making consuance, in *replevin*, shall have double costs of suit, if the plaintiff be nonsuit, discontinue his action, or have judgment against him. (11 G. 2, c. 19, s. 22) (i). Such double costs are estimated by giving the defendant, first, the whole of his single costs, including expenses of witnesses, counsel, fees, &c., and then half of that amount (j).

As to costs generally, see *post*, Book 4, Part 1, Chap. 30.

*Execution.*] The execution for the plaintiff is the same as in ordinary cases, where a plaintiff has judgment for damages and costs, namely, by *feri facias*, *ca. sa.*, or *elegit* (k).

So, if the defendant have judgment under stat. 17 C. 2, c. 7, to recover the arrears of rent, or value of the distress, he shall have execution by *feri facias*, *ca. sa.*, or *elegit* (l).

But, when the defendant has judgment at common law, he shall have execution by a writ *de retorno habendo*, to have a return of the things distrained, and a *feri facias*, or *ca. sa.* for his costs (m). Or, if the defendant have judgment, under stat. 21 H. 8, c. 19, he shall have a writ *de retorno habendo* for a return of the goods; and also a *fi. fa.* or *ca. sa.* for his damages or costs (n). It seems the writ *de retorno habendo*, and *fi. fa.* or *ca. sa.* for the damages and costs, may be included in one writ. The sheriff is not bound to execute a writ *de retorno habendo*, unless some person attend on behalf of the defendant, to shew him the goods; and, it will be a good return to the writ, to say, that no person did attend (o). See the practical directions as to the mode of suing out and executing these writs of *feri facias*, *ca. sa.* or *elegit*, *ante*, Vol. 1, p. 390, 400, 410, 411.

If, to the *retorno habendo*, the sheriff return that the goods, &c., are eloiigned (that is, conveyed to places unknown to him, so that he cannot execute the writ), the defendant may then sue out a *capias in withernam* (p), requiring the sheriff to take other cattle, &c. of the plaintiff, to the value of the cattle, &c., eloiigned, and deliver them to the defendant, to be kept by him until the plaintiff should deliver to him the cattle, &c., originally replevied. If this writ be returned *nihil*, the defendant may sue out an *alias*, and after that a *pluries*; and, if the *pluries* be returned *nihil*, the defendant may then sue out a *scire facias* against the plaintiff's pledges, to shew cause why the price of the cattle, &c., eloiigned, should not be made of their lands and goods, and rendered to the defendant. If no cause be shewn to this *scire facias*, a writ issues to take the cattle, &c., of the pledges. But if they have none, and the sheriff return *nihil* to the writ, the

(i) See *Lloyd v. Winton*, Barnes, 148, 2 Wils. 28, S. C.; *Lindon v. Collins*, Wilses, 429; *Gurney v. Buller*, 1B. & Ald. 670; *Johnson v. Lawson*, 2 Bing. 341; and as to costs upon double pleadings, see *Dodd v. Jodrell*, 2 T. R. 235; and see Book 4, Part 1, Chap. 30.

(j) *Staniland v. Ludlam*, 4 B. & Cres. 889, 7 D. & R. 484, S. C.

(k) See the forms, Chit. Forms, 522. See generally, Vol. 1, p. 373 to 414.

(l) See the forms, Chit. Forms, 518.

(m) See the forms, Chit. Forms, 524, 525.

(n) See the forms, Chit. Forms, 526.

(o) 2 Saund. 74b, c.

(p) 2 Leon. 174; see the form, Chit. Forms. 527.

defendant may then have a *scire facias* against the sheriff himself, requiring him to shew cause why he shall not render to the defendant cattle, &c., to the value of those eloigned (q). Or the defendant may, it should seem, proceed against the pledges, by default, upon the *scire facias* above mentioned. Or, which is much the best and least circuitous method, if the sheriff have not taken pledges, or the pledges be insufficient, the defendant, upon the return of the *elongatq*, may bring an action on the case against the sheriff, and recover damages, whether a *scire facias* have issued against the pledges or not (r).

*Proceedings against the sureties in replevin.*] We have seen *ante*, 578, that the sheriff is bound to take from the party replevying, a bond with sureties, to prosecute the *replevin* suit with effect and without delay, and for returning the goods distrained, if a return be awarded. As to what bond is sufficient, see *ante*, 578.

The sheriff is directed by the statute 11 G. 2, c. 19, s. 23, to assign the bond to the avowant, or person making consurance (s), in the same manner as a bail bond is assigned; and the party afterwards may bring an action on the bond, if forfeited, in his own name; and the Court may, by rule, give such relief to the parties as may be agreeable to justice and reason. The bond may be assigned four days exclusive after the time limited therein for the plaintiff to prosecute his suit (u). Besides this remedy by action, the defendant may (if he has obtained a judgment for a return of the goods taken, and a writ of *retorno habendo* has been issued, and returned *elongata*, or *eloignment*) proceed, as above mentioned, by *scire facias* against the pledges; but this remedy is seldom adopted. The remedy by action is not affected by the 17 C. 2, c. 7, and this notwithstanding defendant proceeds under that act (x). The action on the bond may be brought in the superior Courts, though the *replevin* suit did not proceed further than in the county court (y).

The *replevin* bond is forfeited by not prosecuting the *replevin* suit with success, as well as by making default in the prosecuting of it; therefore you may sue the pledges on their bond, or the sheriff for not taking pledges, or not taking sufficient pledges, without suing out a *retorno habendo* (z). The plaintiff, in *replevin*, by not appearing in the county court immediately succeeding the execution of the *replevin* bond, and then entering his plaint there, creates a forfeiture of the

(q) Hut. 77; 1 Saund. 195, (n. 3).

(r) 16 Vin. Abr. 399, 400; *Richards v. Acton*, 2 W. Bl. 1220; *Tesselman v. Gildart*, 1 New Rep. 292; *Page v. Eamer*, 1 B. & P. 378; and see *Turnor v. Turner*, 2 B. & B. 107, 4 Moore, 606, 616, S. C.

(s) See *Dias v. Freeman*, 5 T. R. 195; *Middleton v. Sandford*, 4 Camp. 36; *Page v. Eamer*, 1 B. & P. 378. See the form of assignment, Chit. Forms 499;

and see Vol. i, 139 to 142.

(u) 2 Sel. Prac. 266.

(x) Gilb. Replevin, 225; *Waterman v. Yea*, 2 Wils. 41; *Turnor v. Turner*, 2 B. & B. 107, 4 Moore, 606, S. C.; *Perreau v. Bevan*, 8 D. & Ry. 72.

(y) *Dias v. Freeman*, 5 T. R. 195; *Brackenbury v. Pell*, 12 East, 585.

(z) *Perreau v. Bevan*, M.S. H. & E. 1826, 8 D. & Ry. 72, S. C.; *Morgan v. Griffith*, 7 Mod. 381.



bond (a). So, the bond will be forfeited if the plaintiff delay prosecuting the suit; as, if he delay proceeding for two years (b), or even for a less time. The bond may be forfeited notwithstanding the removal of the cause into the superior Court (c). But the bond is not forfeited by the plaintiff's not declaring in the county court, if the defendant has not appeared therein to the summons (d). And if the plaintiff enter his plaint, and afterwards be restrained by injunction till his death, whereby the plaint abates, the bond will not be forfeited (e). So, if the plaintiff dies before the termination of the suit, it will abate, and the bond will not be forfeited (f).

The action on the bond must, if the cause was removed by *re. fa. lo.*, be brought in the same court in which the *re. fa. lo.* was returnable (g). The Court will not, it seems, set the proceedings aside because the action is commenced before the forfeiture of the bond, for that may be pleaded (h). Nor will they set aside an execution therein upon an objection which might have been taken before judgment (i).

The plaintiff may recover to the extent of the penalty. Where separate actions were brought against each of the pledges, it was holden that the plaintiff could recover from both damages only to the amount of the penalty, and from each the costs in the separate action against him individually (k). If the distress were for rent, they are not, either jointly or separately, liable beyond the amount of the rent in arrear at the time of the distress, and costs (l). Where a sheriff took a *replevin* bond with one surety only, and was sued for taking insufficient pledges, in which action the plaintiff recovered damages and costs, it was held that the sheriff could not recover against the surety the costs of defending such action, nor more than a moiety of the damages awarded, the surety being deprived of calling on a co-surety for contribution (m).

It may be necessary here to mention, that pledges in *replevin* cannot plead to an action on the *replevin* bond, that they are discharged by a reference to arbitration (n), or by time having been given to the plaintiff in *replevin* (o). But, though they cannot so plead, nevertheless the Court might, on application by *motion* in such cases, relieve them: and where the plaintiff and defendant in *replevin*, without the privity of the pledges, agreed to refer the cause to arbitration, and that the *replevin* bond should stand as a security for the performance of the

(a) *Dias v. Freeman*, 5 T. R. 195.  
 (b) *Axford v. Perrett*, 1 M. & P. 470,  
 4 Bing. 586, S. C.  
 (c) *Gwillim v. Holbrook*, 1 B. & P.  
 410.  
 (d) *Seal v. Phillips*, 3 Price, 17.  
 (e) *Ormond, Duke of, v. Brierly*,  
 Carth. 519, 12 Mod. 380, S. C.  
 (f) *Id.*  
 (g) 2 Sel. Prac. 267.  
 (h) *Anon.* 5 Taunt. 776.  
 (i) *Short v. Hubbard*, 10 Moore, 107,

2 Bingh. 445, S. C.  
 (k) *Hefford v. Alger*, 1 Taunt. 218.  
 (l) *Ward v. Henley*, 1 Y. & J. 285.  
 (m) *Austen v. Howard*, 1 Moore, 68,  
 7 Taunt. 28, S. C.; *Id.* 327, 2 Marsh.  
 352, S. C.  
 (n) *Moore v. Bowmaker*, 7 Taunt. 97,  
 7 Price, 223, 2 Marsh. 392, S. C.; *Ald-  
 ridge v. Harper*, 10 Bing. 118; and see  
*Hallett v. Mountstephen*, 2 D. & Ry. 343.  
 (o) *Moore v. Bowmaker*, 6 Taunt. 379.

award, the Court relieved the pledges (*p*). The pledges are not discharged by the defendant's taking a verdict and judgment for the arrears of rent, &c., under 17 C. 2, c. 19, s. 2, 3 (*q*).

*Proceedings against the sheriff.*] If the sheriff neglect to take a bond, he is not liable to an attachment; but the defendant, if damaged, may have his remedy against him by action on the case (*r*). So, he may have an action on the case against the sheriff for taking insufficient pledges, and may therein recover damages to the extent of the value of the goods replevied (*s*). The high sheriff, under sheriff, and replevin clerk, are all answerable to the defendant for the sufficiency of the pledges *de retorno habendo* (*t*). The plaintiff is not liable if the pledges were apparently responsible at the time of the taking the bond (*u*): if, indeed, the sheriff had notice of the fact of their insufficiency, or neglected the means in his power of knowing it, and did not use an ordinary degree of caution in taking them, he would be liable (*x*). If a person, known to the sheriff, make inquiries as to the credit or reputation of a tradesman, and the value of his stock, and communicate the result of such inquiry to the sheriff, if it be favourable, the latter need not make a personal inquiry (*y*). The sheriff is, it seems, liable in this respect, if one of the sureties was insufficient (*z*). The sureties themselves may prove their sufficiency or not (*a*).

Taking an assignment of the replevin bond is not a waiver of your remedy against the sheriff; and, therefore, if after proceeding against the pledges you find them insolvent, you may still bring your action against the sheriff for taking insufficient pledges (*b*).

The sheriff is only liable to the extent to which the sureties themselves are liable; viz. to double the value of the goods distrained (*c*).

(*p*) *Archer v. Hale*, 1 M. & P. 285, 4 Bing. 464, S. C.; and see *Aldridge v. Harper*, 10 Bing. 124; *Bank of Ireland v. Beresford*, 6 Dow. 238; *Donnelly v. Dunn*, 2 B. & P. 45.

(*q*) *Turnor v. Turner*, 2 B. & B. 107, 4 Moore, 606, 616, S. C.

(*r*) *Re v. Lewis*, 2 T. R. 617.

(*s*) *Yea v. Lethbridge*, 4 T. R. 433; see *Concanen v. Lethbridge*, 2 H. Bl. 36; *Evans v. Branden*, Id. 547; *Hindle v. Blades*, 5 Taunt. 225, 1 Marsh. 27, S. C.; *Sutton v. Waite*, 8 Moore, 27.

(*t*) *Richards v. Acton*, 2 W. Bl. 1220.

(*u*) *Hindle v. Blades*, 1 Marsh. 27, 5

Taunt. 225, S. C.

(*x*) *Scott v. Waithman*, 3 Stark. 168, 1 Phil. Ev. 433, and see *Guyllim v. Scholey*, 6 Esp. 100.

(*y*) *Sutton v. Waite*, 8 Moore, 26.

(*z*) *Scott v. Waithman*, 3 Stark. 168.

(*a*) 1 Saund. 195 *g* (*n*); *Hindle v. Blades*, 5 Taunt. 225, 1 Marsh. 27, S. C.

(*b*) 1 Saund. 195 *e*; and see *Baker v. Garratt*, 3 Bing. 56, 10 Moore, 324, S. C.

(*c*) *Evans v. Branden*, 2 H. Bl. 547; *Baker v. Garratt*, 3 Bing. 59, 10 Moore, 324, S. C.; and see Woodf. Land. & Ten., by Harrison, 778 to 781.

## CHAPTER III.

## SCIRE FACIAS.

SECT. 1. *Scire facias* and in what cases requisite, 598 to 610.

2. *Proceedings upon a scire facias*, 610 to 616.



## SECT. 1.

*Scire Facias, and it what cases it is requisite.*

A *scire facias* is a judicial writ, founded upon some record, and requiring the person against whom it is brought to shew cause why the party bringing it should not have advantage of such record, or (in the case of a *scire facias* to repeal letters patent) why the record should not be annulled and vacated. It is considered in law, however, as an action, and in the nature of a new original (*a*); and, when brought to repeal letters patent, may in fact be an original writ, returnable in Chancery (*b*), or a judicial writ returnable in this Court. (3 *H.* 4, 6, 29). The *scire facias* against bail, against pledges in replevin, to repeal letters patent, or the like, is in fact an *original* proceeding; but when brought to revive a judgment after a year and a day, or upon the death, marriage, or bankruptcy, &c. of parties, or when brought on a judgment in debt on bond, or on a judgment *quando*, &c. against an executor, it is but a *continuation* of the original action (*c*). In some cases it is merely an *interlocutory* proceeding, and in the nature of process, as in the case of a *scire facias quare executionem non*, and *scire facias ad audiendum errores*; sometimes a proceeding after the action has terminated, as in the case of *scire facias quare restitutionem non*, and *scire facias ad rehabendam terram*.

As to the cases in which a *scire facias* is necessary, they shall be considered under the following heads:

1. *Scire Facias* to revive a Judgment after a Year and a Day, 599.
2. *Scire Facias*, upon the Death of Parties, 601.
3. *Scire Facias*, upon the Marriage of Feme Plaintiff or Defendant, 605.
4. *Scire Facias*, upon the Bankruptcy, &c. of Parties, 606.
5. *Scire Facias* on a Judgment in Debt on Bond, 607.

(a) *Skin.* 682; *Comb.* 455; *Winter v. Kretchman*, 2 T. R. 46; *Fenner v. Evans*, 1 Id. 267.

(b) See the form, Tidd Forms, 426;

also a form of *scire facias* for the king on a bond, and declaration, *Id.* 424.

(c) See *Wright v. Nutt*, 1 T. R. 388.

6. *Scire Facias on a Judgment quando, &c. against an Executor*, 608.

7. *Scire Facias in other cases*, 608.

1. *Scire Facias to revive a Judgment after a Year and a Day.*

When a year and day have elapsed after judgment is signed, without execution being sued out upon it, the law presumes that the judgment has been executed, or that the plaintiff has released the execution; and therefore it is that a *scire facias* is required in such a case, in order to give an opportunity to the defendant to shew that the judgment has been already executed, or other cause, if he can, why execution should not issue against him (*d*). And so strict is the rule in this respect, that a plaintiff cannot sue out a *ca. sa.* after the year, even for the purpose of proceeding against the bail, without having first revived the judgment against the principal by *scire facias* (*e*). At common law a judgment in a personal action could not be revived, after a year and day, by *scire facias*, but the only remedy the plaintiff had was to bring an action of debt on the judgment (*f*); in real actions (*g*), and also in mixed actions (*h*), it was otherwise. By stat. *Westm. 2*, (13 *Ed. 1*), c. 45, however, all matters enrolled, to which the king's Court can give effect, shall have such force, that it shall no longer be necessary to implead upon them; but if the plaintiff come into Court within a year, he shall have execution forthwith; or if he come after the year, a *scire facias* shall issue to warn the defendant to appear and shew cause why the said matters enrolled should not be executed; and if he shew no cause, or if he do not appear, then the sheriff shall be commanded to cause the said matter enrolled to be executed. This statute has been holden to extend to judgments in ejectment (*i*), as well as in personal actions; and indeed from the general manner in which it is worded, it should seem to include judgments in every species of action, real, personal, and mixed. The year mentioned in the statute must be computed, not by terms, but by calendar months (*j*), and from the time of the signing of the judgment (*k*).

A *scire facias*, however, is not necessary to revive a judgment for the king (*l*). Also, if the plaintiff have been prevented from suing out execution, by a writ of error (*m*), or injunction (*n*), or by having a

(*d*) 2 Inst. 470; 2 Bac. Abr. Execution, H.

(*e*) *Cholmondeley v. Bealey*, 2 Ld. Raym. 1096; *Cholmley v. Veal*, 6 Mod. 304.

(*f*) 2 Inst. 469; Co. Lit. 290. b.

(*g*) 2 Inst. 470; *Booth v. Booth*, 6 Mod. 288; *Withers v. Harris*, 7 Mod. 64, 66.

(*h*) *Withers v. Harris*, 1 Salk. 258, 2 Id. 600, 7 Mod. 64, 2 Ld. Raym. 806, S. C.; *Proctor v. Johnson*, 1 Ld. Raym. 669.

(*i*) *Withers v. Harris*, 1 Salk. 258, 3 Id. 319, 2 Ld. Raym. 806, S. C.; *Un-*

*derhill v. Devereux*, 2 Saund. 72 e.

(*j*) *Winter v. Lightbound*, 1 Str. 301.

(*k*) *Simpson v. Gray*, Barnes, 197. See the forms of writ to revive a judgment for plaintiff, Chit. Forms, 545 to 549; the like, to revive a judgment for defendant, Id. 549.

(*l*) *Anon.* 2 Salk. 603; *Burr v. Attwood*, 1 Ld. Raym. 328.

(*m*) 2 Inst. 471; 5 Co. 88; Ro. Abr. 899; *Winter v. Lightbound*, 1 Str. 301; *Booth v. Booth*, 6 Mod. 288, 1 Salk. 322, S. C.; *Adams v. Savage*, 3 Id. 321.

(*n*) *Michel v. Cue*, 2 Bur. 660; but see *Winter v. Lightbound*, 1 Str. 301;

judgment with a *cesset executio* for a certain time (*o*), or agreement (*p*), the year and day do not begin to run until the writ of error is determined, the injunction dissolved, or the time for which the execution was stayed have elapsed, respectively. And it has even been determined, that if a writ of error be brought after the year, and the judgment be affirmed (*q*), or the plaintiff be nonsuit, or the writ of error be discontinued (*r*), the party may sue out execution, without a *scire facias*, at any time within a year and day from such determination of the writ of error; because the other party, by bringing error, has revived the judgment. Also, by agreement, the parties may dispense with the necessity for reviving a judgment by *scire facias*, and a clause to this effect is frequently inserted in warrants of attorney. (*See ante*, 493).

Also, if a writ of execution has been sued out, and regularly returned and filed within the year (*s*), you may at any distance of time afterwards sue out another writ of execution (if the judgment has not been satisfied by the former one), without a *scire facias*; and although it was formerly requisite that you should for this purpose enter *continuances* from the first to the second writ (*t*), yet this would not, it is apprehended, be requisite on the present writs of execution, which are not returnable as heretofore in *term*, but "immediately after the execution" thereof. (*See* 3 & 4 *W. 4*, c. 67, s. 2). It has even been holden, that if the plaintiff, after the year and day, enter an award of an *elegit* on the roll, as of the same term with the judgment, he might continue it down by *vicecomes non misit breve*, and sue out an *elegit*, without reviving the judgment by *scire facias* (*u*); and this appears to be warranted by the precedents (*v*). In practice, however, it is the course in these cases to shew that a writ has actually been sued out, and returned and filed before the year. (*See Vol. 1*, 403). It may be necessary here to remark a difference between entering mesne process on the roll, and writs of execution: in the former case, the writs must be all of the same species, in the latter not; thus if a *fi. fa.* be sued out within the year, it will warrant a *ca. sa.* or *elegit* sued out afterwards (*x*).

In cases where a *scire facias* is requisite, if execution be sued out without it, such execution is not void, but voidable only upon writ of error (*y*), or might be set aside upon application to the Court.

A *scire facias* to revive a judgment more than ten years old, can-

*Booth v. Booth*, 1 Salk. 322; 3 P. Wms. 36; 6 Bac. Abr. Sci. Fa. C. *contrd.*

(*o*) *Dillon v. Brown*, 6 Mod. 14; *Booth v. Booth*, Id. 288; *Withers v. Harris*, 7 Mod. 64, 2 Salk. 600, 2 Ld. Raym. 806, S. C.; 1 Ro. Rep. 104.

(*p*) *Winter v. Lightbound*, 1 Str. 301.

(*q*) Ro. Abr. 899; and see *Palm*. 449, *Latch*, 193.

(*r*) *Bellasis v. Hanford*, Cro. Jac. 364; and see 1 Ro. Rep. 104, S. C.; *Lane*, 20; *Howard v. Pitt*, 1 Show. 402, 403.

(*s*) See *Browne v. Pearce*, M. T. 1833, K. B. MSS.

(*t*) *Weiden v. Greg*, 1 Sid. 59; *Aires*

*v. Hardress*, 1 Str. 100; *Low v. Beart*, Barnes, 210; *Blayer v. Baldwin*, 2 Wils. 82; Co. Lit. 290. b.; 6 Bac. Abr. Sci. Fa. C.; R. E. 5 G. 2, r. 3 (*a*); Vol. 1, p. 374. The continuances might be entered at any time.

(*u*) *Seymour v. Greenville*, Carth. 283; *Cooke v. Bathurst*, 2 Show. 235, Comb. 232.

(*v*) Clift. 874, 883.

(*x*) *Aires v. Hardress*, 1 Str. 100, 2 Saund. 68 d; Vol. 1, p. 374.

(*y*) *Patrick v. Johnson*, 3 Lev. 404; *Shirley v. Wright*, 1 Salk. 273, 2 Ld. Raym. 775, S. C.

not be issued without a motion for that purpose in term, or a judge's order in vacation, nor, if more than fifteen years, without a rule to shew cause. (*R. H. 2 W. 4, r. 79*). The proceedings, however, on this writ will be fully noticed, *post*, 612.

## 2. Scire Facias, upon the Death of Parties.

*Death after final judgment, and before execution.*] If the plaintiff die after final judgment, his executors, &c. must sue out a *scire facias* against the defendant, before they can have execution; or if the defendant die after final judgment, a *scire facias* must be sued out against his executors, or against his heir and terretenants (*a*). But if the defendant have died within a year after the judgment, we have seen (*Vol. 1, 374*) that a writ of execution may be sued out against his goods in the hands of his executor, without a *scire facias*, provided such writ of execution bear teste before his death (*a*). So, if he die after a *fi. fa.* sued out, but before it has been executed, there is no necessity for a *scire facias*, but the writ may be executed upon the goods in the hands of the executor, &c. (*b*). If a judgment be revived by *scire facias*, and the defendant die before execution, the plaintiff must sue out another *sci. fa.* against his executors, &c. before he can execute the judgment (*c*). In all these cases, if any of the executors be a *feme covert*, her husband must be made a party to the *scire facias* (*d*). But if any of the executors be a bankrupt, he may notwithstanding proceed or be proceeded against by *scire facias*; for his bankruptcy does not affect his representative character (*e*).

The *scire facias* must be brought by or against the person or persons who represent the deceased. If the plaintiff in a personal action die, the *sci. fa.* must be brought by his executor or administrator; in a real action, by his heir (*f*); in a mixed action, it is said, if the lands to be recovered be fee simple, the heir and executor shall join in the *scire facias*, and the heir have execution as to the lands, and the executor execution as to the damages (*g*). If the defendant die, the *scire facias* must be brought against his executor, or his heir and terretenants, as shall be mentioned presently.

A *sci. fa.* may be sued out by or against the executor of an executor, who has proved the will; but not, by or against the administrator of an executor, or the executor or administrator of an administrator, because they do not represent the deceased (*h*). In these latter cases, administration *de bonis non* must be sued out, and then the administrator *de bonis non* may, by 17 C. 2, c. 8, s. 2, sue out a *scire facias*, and have execution of the judgment; or he may perfect an execution already begun (*i*). This statute, however, does not extend to allow an administrator *de bonis non* to proceed upon a judgment in *scire facias* (*quod habeat executionem*) already obtained

(*a*) Fitz. Execution, 243; 1 Saund. 219 *et* 2 Saund. 6, 72 *c*.

(*b*) See 2 Bac. Abr. Execution, G. 2.

(*c*) 6 Bac. Abr. Sci. Fa. C. 1.

(*d*) 2 Salk. 596.

(*e*) 2 Saund. 72 *c*.

(*f*) Id.

(*g*) 6 Bac. Abr. Sci. Fa. C. 5.

(*h*) 19 E. 4, 5 b; 43 E. 3, 2; Ro. Abr.

889.

(*i*) 5 Co. 9 b.

(*j*) *Clerk v. Withers*, 1 Salk. 323, 2 Ld. Raym. 1072, 6 Mod. 290, 11 Id. 34, S. C.

by the executor in his life-time, but he must sue out a *scire facias* to revive the original judgment (*k*); nor does it extend to judgments by default, but to judgments after verdict only (*l*). Also, if a judgment be recovered against an executor who dies intestate, it may be revived as against the administrator *de bonis non*, at common law, and execution had upon the judgment (*m*). If an administrator *durante minori ætate* bring an action, and recover, and the executor then come of age, the latter may have a *scire facias* upon the judgment (*n*).

If *nil* be returned to a *scire facias* against the executor, the plaintiff may have another *sci. fa.* against the heir and terretenants, in order to have execution of any lands of which the defendant was seised at the time of the judgment, or after it (*o*); but it is said that the *scire facias* will not lie against the heir and terretenants, unless *nil* have first been returned to a *sci. fa.* against the personal representatives of the deceased (*p*). It is usual to join the heir and terretenants (*q*). You may, however, sue out the writ against the heir alone, without naming the terretenants; but it seems the better opinion, that it cannot be sued out against the terretenants alone, without the heir, unless the heir have been already summoned, or it be returned that there is no heir, or that the heir has no lands; for the heir may have a release or some other matter to plead, in bar of execution (*r*). If brought against both, it is said, that if it be returned that the heir has no lands, the writ may proceed against the terretenants without him (*s*). The writ may be against the tenants either generally or by name (*t*). The former, however, is preferable; for if the plaintiff undertake to name them, and do not name all, those named may plead that matter in abatement (*u*). After a *scire facias* against the heir and terretenants, the plaintiff can have execution only of a moiety of the lands, by *elegit*, in the same manner as if the defendant were living (*x*); even although the heir may have pleaded a false plea (*y*), which, in actions against an heir on the bond of his ancestor, would have the effect of charging the defendant in the same manner as if the action were for his own debt (*z*).

(*k*) *Trebivan v. Lawrence*, 2 Ld. Raym. 1049.

(*l*) *Clerk v. Withers*, 1 Salk. 322, 2 Ld. Raym., 1072, 6 Mod. 290, 11 Id. 34, S.C.

(*m*) 2 Saund. 72 *o*; *Snape v. Norgate*, Cro. Car. 167; 1 Ro. Abr. 890, T. pl. 3; W. Jon. 214.

(*n*) Ro. Abr. 888; *Beaumont v. Long*, Cro. Car. 227, 2 Brownl. 83, Godb. 104; *Hatton v. Mascal*, 1 Lev. 181. See forms of *scire facias* for or against an executor or administrator to revive a judgment obtained by or against the testator or intestate, Chit. Forms, 563; Co. Ent. 617 *a*, 618 *b*; Lll. Ent. 638 to 659; and see *Morfoot v. Chivers*, 1 Str. 631, 2 Ld. Raym. 1395, S.C.

(*o*) 2 Saund. 7, (*n*. 4), 72 *o* *p*.

(*p*) *Panton v. Terretenants of Hall*, Carth. 107, 2 Salk. 598, S.C.

(*q*) F. N. B. 597 (*a*); *Sir C. Haydon's case*, Cro. El. 896; *Eyres v. Taunton*, Cro. Car. 295; *Panton v. Terretenants of Hall*, 2 Salk. 598; Lll. Ent. 384, 385.

(*r*) 6 Bac. Abr. Sci. Fa. C. 5; 27 H. 6, 135; 1 E. 2, 242; 3 Co. 13 *a*; *Eyres v. Taunton*, Cro. Car. 295, 313.

(*s*) F. N. B. 597 (*a*).

(*t*) *Proctor v. Johnson*, 2 Salk. 600, 1 Ld. Raym. 609, S.C.

(*u*) Comb. 282; *Adams v. Terretenants of Savage*, 1 Salk. 40, 2 Id. 679, 601, 6 Mod. 134, 199, 226, S.C.; 1 Ro. Rep. 57.

(*x*) 2 Saund. 7, (*n*).

(*y*) W. Jon. 87, 88; *Brandlin v. Millbank*, Carth. 93, Comb. 162.

(*z*) See the form of a *scire facias* against heir and terretenants, Chit. Forms, 567.

*Death between verdict and judgment.*] In all actions, personal, real or mixed, the death of either party between verdict and judgment shall not be alleged for error, so as such judgment be entered within two terms after such verdict. (17 C. 2, c. 8, s. 1) (a). This statute extends to all personal actions, notwithstanding the cause of action could not have survived to the representatives of the deceased, as for a libel, &c. (b). It does not extend to a *nonsuit* (c).

The death of either party before the assizes or sittings is not remedied by this statute (d); but if the party die after the assizes begin (e), or after the first day of the sittings (f), though before the trial, it is within the remedy of the statute; for the assizes or sittings are but one day in law.

It is not necessary that the judgment should be actually entered upon the roll within two terms after the verdict; if it be signed within that time it will be sufficient (g); and it seems even the signing of the judgment within that time will be unnecessary if prevented by any application to the Court delaying it (h), or by any act of the Court, as in the case of a special verdict or special case (i). And at common law, if either party die after special verdict and pending the time for argument, &c. thereon, or on demurrer or motion in arrest of judgment, or for a new trial, judgment may be entered after the death as of the term in which the *postea* was returnable, or in which judgment would otherwise have been given, *nunc pro tunc* (j). So in actions against executors, &c. if the motion be made within a reasonable time, the Court will give the plaintiff leave to enter up judgment as of a preceding term when it was signed, *nunc pro tunc* (k). But generally the Court have no power to allow judgment to be entered *nunc pro tunc* (l); and at all events they will not so allow it where the delay is wholly attributable to the laches of the party applying (m).

The judgment is entered for or against the deceased party, as if he were living (n).

But although the judgment in this case is entered as if the party were alive, yet it must be revived by *scire facias* before execution can be sued out upon it (o). And, as the *scire facias* must pursue the judgment, it must recite it as if it had been entered in the party's life-time (p); that is, the *sci. fa.* must be in the form in which the writ

(a) See *Pond v. King*, 1 Wils. 124.

(b) *Pulmer v. Cohen*, 2 B. & Adolp. 966.

(c) *Dowbiggin v. Harrison*, 10 B. & C. 480.

(d) *Taylor v. Harris*, 3 B. & P. 549.

(e) *Anon.* 1 Salk. 8; *Plummer v. Webb*, 2 Ld. Raym. 1415; *Anon.* 7 T. R. 32, (n).

(f) *Jacobs v. Miniconi*, 7 T. R. 31.

(g) *Helle v. Baker*, 1 Sid. 385; *Webb v. Spurrell*, Barnes, 261, 2 Saund. 72m; and see *Duke of Norfolk's case*, 1 Salk. 401.

(h) *Bridges v. Smyth*, 8 Bing. 29.

(i) *Lawrence v. Hodgson*, 1 Y. & J. 368, and the cases there cited.

(k) *Mara v. Quin*, 6 T. R. 6.

(l) *Copley v. Day*, 4 Taunt. 702; *Rhodes v. Haigh*, 3 D. & R. 608; *Fowler v. Whadcock*, Barnes, 262; *Lawrence v. Hodgson*, 1 Y. & J. 368.

(m) *Id.*

(n) *Weston v. James*, 1 Salk. 42; *Colebeck v. Peck*, 2 Ld. Raym. 1290.

(o) *Earl v. Brown*, 1 Wils. 302.

(p) *Colebeck v. Peck*, 2 Ld. Raym. 1290; and see 1 Lev. 277; 2 Saund. 72 m.



is usually conceived, when brought by or against the personal representatives of a person who died after judgment. (*See ante*, 601) (q).

*Death between interlocutory and final judgment.*] If either plaintiff or defendant, in actions in Courts of record, happen to die after interlocutory and before final judgment, the action shall not abate, if it be such as might originally be prosecuted by or against the executor, &c. of the party dying; but the plaintiff or his executors or administrators, shall have a *scire facias* against the defendant or his executors, &c. to shew cause why damages should not be assessed and recovered by him or them; and upon *scire feci* returned, or upon *nihil* returned, and eight days elapsed from its return, and leave of the Court or a Judge obtained (*R. H. 2 W. 4, r. 81*), and default made, or no cause shewn, a writ of inquiry shall be awarded, executed and returned, and final judgment thereupon given. (8 & 9 W. 3, c. 11, s. 6) (r).

If the death happen before the writ of inquiry is executed, it must be to shew cause why the damages should not be assessed against the defendant, or his executors, &c. as the case may be (s). But if the death happen after the execution of a writ of inquiry, the *scire facias* must be to shew cause why the damages assessed by the jury should not be recovered; otherwise it will be quashed (t).

The final judgment in this case is, of course, for or against the executor, &c. and not for or against the testator himself as upon the statute 17 C. 2, above mentioned (u).

Also, in case of the death of a defendant, besides the *scire facias* here mentioned, sued out before final judgment, another *scire facias* must be sued out after final judgment, in order to give the executors an opportunity of pleading the want of assets, &c.; for it would be unreasonable that the executors should be in a worse situation when the defendant dies before final judgment, than when he dies after it (x).

*Death of one of several plaintiffs or defendants.*] Where there are two or more plaintiffs or defendants, and one dies after judgment, execution by *feri facias* or *ca. sa.* may be sued out as in other cases without any *scire facias* (y); but the execution must be in the joint names of all the plaintiffs or defendants, and must in other respects

(q) See forms of the *scire facias*, &c. Chit. Forms, 574.

(r) See *Wallop v. Irwin*, 1 Wils. 315; *Fort v. Oliver*, 1 M. & Sel. 242; *Berger v. Green*, Id. 229.

(s) *Smith v. Harmon*, 1 Salk. 315; Lill. Ent. 647; and see the form, where the death happened before issuing of writ of inquiry, Chit. Forms, 575; and when it happened after the issuing, and before execution of the writ, Id. 576; Clift. 680; Lill. Ent. 647.

(t) *Goldsworthy v. Southcott*, 1 Wils.

243; *Executors of Wright v. Nutt*, 1 T. R. 388. See the form, Chit. Forms, 576.

(u) *Weston v. James*, 1 Salk. 42

(x) 2 Saund. 72 n; *Tomkins v. Gratton*, Say. 266. See form of the *sci. fa.* upon the first judgment, Chit. Forms, 577; and of the *sci. fa.* on the final judgment, Id. 578.

(y) 6 Bac. Abr. Sci. Fa. C. 4; *Withers v. Harris*, 7 Mod. 68, 2 Ld. Raym. 808, S. C.; *Brace v. Pennoyer*, 5 Mod. 339; *Pennoyer v. Brace*, Carth. 404; *Howard v. Pitt*, 1 Show. 402.

pursue the judgment (z). If the plaintiff, however, wish to sue out an *elegit* against the lands of a deceased defendant, as well as against the survivor, he may have a *scire facias* against such survivor and the heir and terretenants of the deceased, to have execution against the lands and goods of the former, and the lands of the latter (a).

### 3. *Scire Facias, upon the Marriage of a Feme Plaintiff or Defendant.*

*Marriage of feme plaintiff.*] If a feme sole obtain judgment, and marry before execution, a *scire facias* must be brought by husband and wife, in order to have execution of the judgment (b); and if, after execution awarded on this *scire facias*, but before execution, the wife die, the husband alone may have execution upon the judgment, without even taking out administration (c). So, if the husband and wife obtain judgment for a debt due to the wife *dum sola*, the husband may have a *scire facias* to execute the judgment (d); or he may, it seems, sue out execution in the names of himself and wife, without a *scire facias*.

But if husband and wife have judgment for a debt due to the wife as executrix, and the wife die before execution, the succeeding executor or administrator *de bonis non*, and not the husband, shall have the *scire facias* (e).

*Marriage of feme defendant.*] If judgment be recovered against a feme sole, and she marry before execution, a *scire facias* must be brought against the husband and wife, before the judgment can be executed (f); and if, after execution awarded upon this *scire facias*, but before execution, the wife die, the husband shall be liable to the execution (g). However, in a case where a *feme sole* defendant married after interlocutory judgment, the Court held that the plaintiff might proceed to final judgment and execution against her, without suing out a *scire facias* to make the husband a party (h). And in a more recent case, where a *feme sole* defendant in ejectment married before trial, and the plaintiff proceeded to judgment, and sued out a *habere facias* and a *fi. fa.* against her by her maiden name, without a *scire facias*; the Court held that there was no pretence for

(z) *Penoyer v. Brace*, 1 Ld. Raym. 244; Comb. 441, S. C.; 1 Salk. 319, S. C. See *Withers v. Harris*, 2 Ld. Raym. 808, 7 Mod. 68, S. C.

(a) *Panton v. Terretenants of Hull*, Carth. 107; 2 Saund. 72 p; and see 6 Bac. Abr. Sci. Fa. C. 5; 2 Id. Execution, G. 1. See Vol. 1, p. 405. See forms, Chit. Forms, 579, 580.

(b) 2 Saund. 72 k. See the form, Chit. Forms, 581; Thes. Brev. 256, 265; Clift. 681.

(c) 6 Bac. Abr. Sci. Fa. C. 6; *Woodyer v. Gresham*, 1 Salk. 116; Comb. 455;

Carth. 415; Skin. 682, S. C.

(d) *Eyres v. Coward*, 1 Sid. 337; *Butler v. Delt*, Cro. El. 844; *Obrian v. Ram*, 3 Mod. 188; 6 Bac. Abr. Sci. Fa. C. 6.

(e) *Beaumont v. Long*, Cro. Car. 208, 227, W. Jon. 248, S. C.; 6 Bac. Abr. Sci. Fa. C. 6.

(f) 2 Saund. 72 k. See the form, Chit. Forms, 582; Thes. Brev. 247, 251.

(g) 6 Bac. Abr. Sci. Fa. C. 6; *Obrian v. Ram*, 1 Salk. 116; *Woodyer v. Gresham*, Id. Carth. 30, 415.

(h) *Cooper v. Hunchin*, 4 East, 521.

setting aside these writs on that account; for the writ of possession could not affect the husband or his property, the verdict proving that the wife had no interest in the term; and as to the *fi. fa.* it was merely inoperative, as the wife could have no separate property in goods upon which such a writ might be executed (i).

Where a *feme covert*, sued as a *feme sole*, had judgment on a plea of coverture, and execution was sued out in the names of her and her husband, the Court held it to be clearly irregular; execution should not have been sued out in the name of the husband, until he had first been made a party to the judgment by *scire facias*; but in this case, the wife might have sued out execution in her own name, because the plaintiff, by declaring against her as a *feme sole*, was concluded from denying it (k).

#### 4. *Scire Facias, in case of Bankruptcy or Insolvency.*

*Bankruptcy, &c. of plaintiff.*] If a party obtain interlocutory judgment, and before final judgment become bankrupt, his assignees may proceed to final judgment in his name, and then sue out a *scire facias* to make themselves parties, in order to have execution (l); and even where execution was taken out in the name of the bankrupt, without a *scire facias* being sued out by the assignees, the Court refused to set aside the proceedings (m). So, if a party have final judgment, upon which the defendant brings a writ of error, and pending the writ of error the plaintiff become bankrupt, his assignees ought to proceed to an affirmance of the judgment in the bankrupt's name, and then sue out a *scire facias* in order to have execution (n).

The practice, it should seem, is the same, where the plaintiff takes the benefit of an insolvent act.

*Bankruptcy, &c. of defendant.*] If a party have been a bankrupt, or have taken the benefit of an insolvent act, or have compounded with his creditors, and afterwards become a bankrupt, and obtain his certificate; his person only shall be thereby protected; but his future estate and effects (with the exception of his "tools of trade, necessary household furniture, and the wearing apparel of himself, his wife, and children"), unless his estate pay 15s. in the pound under the fiat, will vest in the assignees under the first fiat, who may seize them in the same way as they may seize property possessed by the bankrupt at the issuing of the fiat. (6 G. 4, c. 16, s. 127).

(i) *Doe d. Taggart v. Butcher*, 3 M. & Sel. 557.

(l) *Hewit v. Mantell*, 2 Wils. 372. See the form, Chit. Forms, 583.

(k) *Wortley v. Rayner*, 2 Doug. 637.

(m) *Wauagh v. Aulton*, 3 T. R. 437; and see *Plummer v. Lea*, 5 Mod. 88;

*Winter v. Kretchman*, 2 T. R. 45.

(n) *Kretchman v. Hoyer*, 1 T. R. 463, 631; *Winter v. Kretchman*, 2 Id. 45; *Monk v. Morris*, 1 Mod. 93, 1 Vent. 193, S. C.; *Hewit v. Mantell*, 2 Wils. 372; *Bibbins v. Mantell*, Id. 378.

Since this enactment, therefore, the property being vested in the assignees, the judgment creditor in these cases has not, as such creditor, any right of seizing such future effects as he formerly had. The former practice was, that if the creditor in such a case obtained a judgment, which was signed *after* the defendant had obtained his certificate under the second commission, it might have been special against his future estate and effects, with the exception of his tools of trade, &c.; but where the judgment was had *before* the defendant had obtained his certificate, it must have been a general judgment (o), and the plaintiff could not thereupon sue out a special execution against the defendant's future effects (p), but must have proceeded by *scire facias* (q).

By the Lords' act, (32 G. 2, c. 32, s. 20), the future effects of insolvents, discharged under that act, are rendered liable to their debts, with the exception of the necessary wearing apparel and bedding of the insolvent and his family, and the necessary tools for the use of his trade or occupation, not exceeding 10*l.* in value in the whole. If a general judgment be had against a person before his discharge under this act, a special execution cannot afterwards be sued out upon it, without first suing out a *scire facias* (r).

#### 5. *Scire Facias on a Judgment in Debt on Bond.*

In debt on bond or other instrument in a penal sum, conditioned for the performance of covenants, or for the doing of any other specific act, although the judgment is entered up for the entire penalty, yet execution is sued out for the amount of such damages only as the jury assess upon the breaches assigned or suggested, as has been already mentioned, *ante*, 522. The judgment, however, still remains as a security to the plaintiff for such damages as he may sustain by any further breaches; and in case of any such further breaches, the plaintiff shall have a *scire facias* upon the judgment, against the defendant, his heirs, terretenants, or executors or administrators, suggesting such breaches, and summoning him or them to shew cause why execution should not be awarded upon the judgment. (8 & 9 W. 3, c. 11, s. 8,) *ante*, 523 (s). We have seen, *ante*, 502, that this *scire facias* is not necessary on a judgment upon a warrant of attorney, and that though it is usual to insert in such warrant a clause dispensing with the *scire facias*, it is unnecessary.

The *scire facias* in this case should recite the whole proceedings in the former action, or at least so much of them as to make it appear that the judgment is warranted by the statute; and it must then suggest the further breaches (t). Or, if the plaintiff in the original

(o) 2 Saund. 72 g, h.

(p) *Burton v. Mardin*, 1 T. R. 82.

(q) See 2 Saund. 72 h; 1 Id. 358, (n); *Gill v. Scrivens*, 7 T. R. 27; *Edmonson v. Parker*, 3 B. & P. 185; and the forms, Tidd's Forms, 469, 471.

(r) *Burton v. Mardin*, 1 T. R. 82; see also *Spalton v. Moorhouse*, 6 T. R. 366; and a form, Tidd's Forms, 471.

(s) See 1 Saund. 58; 2 Id. 72 g, 187 b.

(t) 1 Saund. 58 e. See the form, Chit. Forms, 435.

action has set forth only some of the covenants, and he now wish to recover damages for breaches of others, it should seem that he may now state these latter covenants in the *scire facias*, and assign breaches on them (u).

The proceedings upon this *scire facias* are the same as in the original action; (see *ante*, 524); but it is not necessary that there should be any other judgment than the usual one in *scire facias*, namely, an award of execution (x).

The plaintiff was always entitled to costs on this *scire facias*, even before the 3 & 4 W. 4, c. 42, s. 34, whether the defendant pleaded to it or not, notwithstanding sect. 3 of the 8 & 9 W. 3, c. 11, gave costs in suits upon writs of *scire facias* generally, only in cases where the plaintiff obtained an award of execution after plea pleaded or demurrer joined (y).

#### 6. *Scire Facias on a Judgment quando, &c. against an Executor.*

If, on the plea of *plene administravit* in an action against an executor or administrator, or on the plea of *riens per descent* in an action against an heir, the plaintiff, instead of taking issue on the plea, take judgment of assets *quando acciderint*; in this case, if assets afterwards come to the hands of the executor or heir, the plaintiff must first sue out a *scire facias* against such executor or heir, before he can have execution.

As the judgment *quando acciderint* is that the plaintiff do recover his debt, to be levied of the goods, &c. of the testator, which shall thereafter come to the hands of the executor, &c. it is necessary that the *scire facias* should state that the assets came to the executor's hands after the judgment; otherwise it would be bad (z).

If upon this *scire facias* assets be found for part, the plaintiff may have judgment to recover so much immediately, and the residue of assets *in futuro* (a).

As to the *scire fieri* inquiry, see *post*, Pt. 2, Ch. 5, § 2.

#### 7. *Scire Facias in other Cases.*

When special bail become fixed, by the recognizance being forfeited, one of the modes of proceeding against them, we have seen, is by *scire facias* on the recognizance. See upon this subject, Vol. 1, 431, 434 (b). The *scire facias* in this case is an original proceeding.

If, to the *pluries capias in withernam* in replevin, the sheriff re-

(u) 2 Saund. 187 b.

(x) 1 Saund. 58 e.

(y) 1 Saund. 58 e; *Brooke v. Booth*, 11 East, 307.

(z) 2 Saund. 219 a; *Mara v. Quin*, 6

T. R. 1. See the form, Chit. Forms.

(a) See *Noell v. Nelson*, 1 Sid. 448; 1 Saund. 336 b.

(b) 2 Saund. 72 abd; and see forms of writ, Chit. Forms, 315.

turn *nil*, a *scire facias* issues against the pledges; (*ante*, 594) (c); and if no cause be shewn, another *capias in withernam* issues against the cattle of the pledges; and if *nil* be returned to that writ, a *scire facias* issues against the sheriff himself. (*Ante*, 594) (d). But this *scire facias* against the pledges and the sheriff is obsolete, it being the practice to proceed upon the replevin bond against the former, and by action on the case against the latter, for taking insufficient pledges, or no pledges, without bringing any *scire facias*.

After judgment in error, reversing the judgment of the Court below, if the amount of the damages awarded by the former judgment had been previously levied, but not paid over, the plaintiff in error must now sue out a *scire facias quare restitutionem non*, suggesting the matter of fact, namely, the sum levied, &c. before he can have a writ of restitution. (*Vol.* 1, 363) (e).

Where a plaintiff in an action has execution by *elegit*, and is put into possession of a moiety of the rents and profits of the defendant's lands, if the defendant tender the debt, &c. to the plaintiff, and it be refused, or if the plaintiff have been satisfied his debt from any casual profit of the land, the defendant may have a *scire facias ad rehabendam terram*; or if the plaintiff have been satisfied his debt from the extended value of the lands, the defendant may either have this *scire facias*, or he may enter upon the land, and recover actual possession by ejectment (f).

A *scire facias* is the only means of repealing letters patent.\* The *scire facias* in this case may be brought either on behalf of the king, or, where the patent has been granted to the prejudice of another, by the injured party at the king's suit. It may be sued either in the Petty Bag in Chancery (g), or in this Court (h).

In error from this Court or the Court of Common Pleas to the Court of Exchequer, if the plaintiff do not assign errors, the defendant may, it seems, sue out a *scire facias quare executionem non*, in order to compel him (i). So, if, after the plaintiff has assigned errors, the defendant do not join in error, the plaintiff may sue out a *scire facias ad audiendum errores*, in order to compel him (k). Upon neither of these writs does the party suing it but declare, or is the other party allowed to plead; but they are considered merely as process to compel an assignment of errors or joinder (l).

Where an outlawry is pardoned by the king, the defendant must sue out a *scire facias*, requiring the plaintiff to appear and prosecute his suit against him, and he must have the plaintiff summoned thereon (m). There are no further proceedings upon this writ.

(c) Comb. 1.

(d) See Hut. 77.

(e) See the form of it, Chit. Forms, 224.

(f) 6 Bac. Abr. Sci. Fa. C. 2; 2 Saund. 72 u-s. See Vol. 1, p. 407.

(g) 4 Inst. 88; 2 Saund. 72 q.

(h) 3 H. 4, 6, 29. See as to this *scire facias*, 2 Saund. 72 p-q; 6 Bac. Abr. Sci. Fa. C. 3, and the form, Tidd Forms.

(i) See as to this writ, Vol. 1, pp. 363, 374; and the form of it, Chit. Forms, 239.

(k) See as to this writ, Vol. 1, p. 365. See the form of it, Chit. Forms, 243.

(l) As to the proceedings upon them, see Vol. 1, pp. 363, 365.

(m) Trye, 134, 154. See Style, 348. *Allen v. Powell*, 1 Sid. 231; and *post*, Book 4, Part 1, Chap. 2.

If a bill of exceptions be sealed by a judge, and he die, a *scire facias* lies against his executors or administrators to certify it (n).

If a sheriff, after returning to a *fi. fa.* that he has levied the debt, retain the money in his hands, a *scire facias* may be sued out to compel him to pay it over to the party (o). Or, if the sheriff to a *fi. fa.* return that he seized goods and sold part of them, but that the remainder were rescued, a *sci. fa.* lies against him, to have execution for the entire sum returned (p). But if the sheriff return merely that the goods remain on his hands for want of buyers, in such case a *scire facias* does not lie, but a *venditioni exponas*, or a *distringas nuper-vicecomitem*, as mentioned, Vol. 1, 402 (q).

As to the *scire fieri* inquiry, see *post*, Pt. 2, Ch. 5, § 2.

## SECT. 2.

### *Proceedings upon a Scire Facias.*

*The writ, summons, &c.*] A *scire facias* upon a recognizance of bail must be directed to the sheriff of Middlesex (R. H. 2 W. 4, r. 80) (r), although the venue in the original action have been laid in a different county (s). But a *scire facias* founded upon a judgment, must be directed to the sheriff of the county in which the venue was laid, the defendant being supposed to reside in that county (t); though indeed, to a return of *nihil* to the writ against the personal representatives, the plaintiff, upon a *testatum*, may have a *scire facias* against the heir and terretenants in a different county (u).

A *scire facias* on a recognizance against bail, must be tested on the return day of the *ca. sa.* against the principal, and the *alias sci. fa.* (if issued, but which is now rarely the case), upon the return day of the *sci. fa.*, if the original action were commenced by writ of *capias* or detainer (see R. E. 5 G. 2, r. 3a) (x); or if the action against the principal were by original (which cannot be the case except in ejectment or replevin, and in some other actions removed from inferior Courts), the *sci. fa.* should be tested on the *quarto die post* of the *ca. sa.* and the *alias sci. fa.* (if issued) on the *quarto die post* of the *sci. fa.* (y). But a *scire facias* upon a judgment may be tested on any day of

(n) 2 Inst. 438.

(o) Hut. 32; *Sly v. Finch*, Cro. Jac. 514; And. 247; Godb. 276.

(p) *Sly v. Finch*, Cro. Jac. 514; 2 Saund. 243.

(q) Id., and 2 Saund. 71 b, c.

(r) *Bond v. Isaac*, 1 Bur. 409; 2 Saund. 72 c.

(s) *Coseter v. Burke*, 5 East, 461; Vol. 1, p. 432.

(t) *Wharton v. Musgrave*, Cro. Jac. 331; Velv. 218; Hob. 4, S. C.

(u) *Egges v. Taunton*, Cro. Car. 313; *Panton v. Terretenants of Hall*, Carth.

105.

(x) *Stewart v. Smith*, 2 Ld. Raym. 1567; *Shiners v. Brooks*, 8 T. R. 628; *Anon.* 2 Salk. 599; 6 Mod. 86; *Andrews v. Harper*, 8 Mod. 227.

(y) *Stewart v. Smith*, 2 Str. 866. It seems, the *alias sci. fa.*, if issued, although the action were commenced by original, may be tested on the return-day of the first *sci. fa.*, or on any day between it and the *quarto die post* inclusive: see *Combe v. Cuttill*, 10 Moore, 535; 3 Bing. 162, S. C.; at all events, it may be so in the Common Pleas.

the term of which the judgment is signed (x), or in any subsequent term; and the *alias* (if issued), on the return day or the *quarto die post* of it, according as the original action was commenced by writ of *capias*, or detainer, or by original.

A *scire facias* upon a judgment in an action commenced by writ of summons or *capias*, or upon a recognizance of bail in an action commenced by writ of *capias* or detainer, must be made *returnable* on a day certain in term (a). If the original action were commenced by original (as it may be or is supposed to be in ejectment and replevin, and in some other actions removed from inferior courts), the *scire facias* must be made returnable on a general return day in term (b); and in all other cases it may be returnable on a general return day. (*R. E. 5 G. 2, r. 3 a*). If returnable on a day certain (as is now always the case where the original action was commenced by summons, *capias*, or detainer), and only one writ is to be sued out, it is sufficient if there be *four days exclusive* between the teste and return (c). But if the writ must be returnable on a *general return day*, there must be fifteen days between the teste and return; (*R. E. 5 G. 2, r. 3, a; T. 8 W. 3, r. 1, a*). If it be intended to sue out two writs (which as we shall presently see, is now in general unnecessary), there must be fifteen days inclusive (d), between the return of the second and the teste of the first writ; (*R. T. 8 W. 3, r. 1, a; E. 5 G. 2, r. 3, a*) (e); the number of days, however, between the teste and return of each writ is immaterial (f).

Care must be taken that the *scire facias* strictly pursue the terms of the judgment, recognizance, or other record, upon which it is founded. Upon a judgment against two, you cannot sue out a *scire facias* against one (g); although upon a recognizance it is otherwise, because it is joint and several (h). A *scire facias* for the non-performance of a certain promise and undertaking (in the singular number), where the judgment was upon several promises, was holden bad (i). So, where upon a judgment of assets *quando acciderint*, a *scire facias* was sued out praying execution of assets generally, instead of such assets only as had come to the hands of the executor since the former judgment, the Court held that it could not be supported (k).

The writ must in all cases be sued out of the Court in which the record is supposed to remain (l).

In the case of a *scire facias* to revive a judgment, it is sometimes necessary to obtain the leave of the Court to sue it out. At any

(z) 2 Salk. 599.

(a) See *R. E. 5 G. 2, r. 3, (a)*; *Eden v. Wills*, 2 Ld. Raym. 1417, 2 Stra. 694, S. C.

(b) *Id.*

(c) *Bell v. Jackson*, 4 T. R. 663.

(d) *Hicks v. Jones*, 2 Str. 765; *Goodwin v. Peek*, 2 Salk. 599.

(e) *Goodwin v. Beakbean*, Carth. 468; 12 Mod. 215, S. C.; *Anon.* 7 Mod. 40;

*Levingston v. Stoner*, T. Jon. 228, 221; *Alyson v. Byston*, Cro. El. 738.

(f) *Elliott v. Smith*, 2 Str. 1139.

(g) *Panton v. Hall*, 2 Salk. 598.

(h) 2 Inst. 395; and see 2 Ro. Abr. 468; 2 Saund. 72 bc.

(i) 2 Str. 893.

(k) *Mara v. Quin*, 6 T. R. 1.

(l) See *Guillam v. Hardisty*, 3 Salk. 320; 1 Ld. Raym. 216, S. C.



time before seven years from the signing of the judgment, it may be sued out as a matter of course; after seven years, and under ten, there must be a side bar rule; and after ten years, there must be a motion in Court in term, or an application to a Judge in vacation, supported by an affidavit that the judgment is unsatisfied. (*R. H. 2 W. 4, r. 79*) (m). After fifteen years, the Court will grant only a rule nisi. (*R. H. 2 W. 4, r. 79*).

In order to sue out the writ, if the proceedings in the original action were by summons, *capias*, or detainer, make out a *præcipe* for the writ (n), and the writ, and take them to the signer of the writs, who will sign the writ; pay him 1s. 8d.; get it sealed; pay 7d. The alias (if issued, but which, as we shall presently see, is now rarely the case) is sued out in the same manner. If the proceedings in the original action were by original, prepare your *præcipe* for the writ, and take it to the filicer, who will make out the writ; pay him 3s. 4d.; get it sealed; pay 7d. Or, if expedition be required, you may engross the writ on a plain piece of parchment, and get it signed by the filicer; pay him 3s. 4d. An *alias sci. fa.* however, is not signed by the filicer, but by the signer of the writs; pay him 1s. 8d. signing; sealing 7d.

Having thus sued out the writ, take it to and leave it at the sheriff's office, at least four clear searching days before the return of it, exclusive of the day of leaving it at the office, and of the day on which it is returnable. (*R. E. 5 G. 2, r. 3*) (o). Sunday, or any other day on which search could not be made at the sheriff's office, must not be reckoned as one of the four days (p). The sheriff must indorse on every *scire facias* the day of the month on which it is left with him. (*R. E. 5 G. 2, r. 3*).

The next step to be taken, is, if possible, to give the defendant notice of the *scire facias*, by summons, if he reside in the county into which the *sci. fa.* issues, or by notice, if he reside elsewhere. Formerly, it was the constant practice, where you did not intend to summon the defendant, or, in other words, to let him know of the *scire facias* having been sued out, or where you could not summon him, to have issued a writ of *scire facias*; and, having procured the sheriff's return of *nihil*, you sued out an *alias scire facias*, and procured the sheriff's return of *nihil* to that writ also, upon which return you might, if the defendant did not appear, have obtained a judgment against him, two *nihil*s being deemed equivalent to a *scire feci* or garnishment (q). Now, however, by rule of *H. T. 2 W. 4, r. 81*, no more than one *scire facias* is in any case necessary, whether the

(m) *Hardisty v. Barny*, 2 Salk. 598; *Lowe v. Robins*, 1 B. & B. 381, 3 Moore, 757, S. C. See the form of affidavit and rule, Chit. Forms, 545.

(n) See the forms, Chit. Forms, 544, 545.

(o) *Forty v. Hermer*, 4 T. R. 583; *Müller v. Yerraway*, 3 Bur. 1723; *Anon.* 1 Dowl. P. C. 142; *Fraser v. Miller*, Id.

141; *Furnell v. Smith*, 7 B. & C. 693; *Goodwin v. Lugar*, 6 M. & Sel. 133; 2 Chit. Rep. 192, S. C.; *Scott v. Larkin*, 7 Bing. 109, 4 M. & P. 748; 1 Dowl. P. C. 202, S. C.

(p) 1 Id.

(q) *Randall v. Wale*, Velv. 88; *Bromley v. Littleton*, Id. 112; *Clarke v. Bradshaw*, 1 East, 89.

defendant be actually summoned thereon or not. But no judgment can be signed for not appearing to a *scire facias*, unless the defendant has been summoned, or, if not summoned, then, unless eight days have elapsed since the return of the *scire facias*, and you have obtained the leave of the Court or a Judge to sign the judgment. The object of this rule is to make it the plaintiff's duty to give notice of the *scire facias* to the defendant as above mentioned, either by summons, if the defendant reside in the county into which the *scire facias* issues, or by notice, if he reside elsewhere; and if neither of these things can be done, the plaintiff must shew by affidavit that he has attempted to summon the defendant or give him notice, and shew what endeavours he has made for that purpose (r).

Where the defendant can be summoned,—Get a warrant on the writ of *sci. fa.* from the sheriff's office; pay 2s. 6d.; and give the warrant to your officer, who will thereupon summon the defendant; pay him 6d. for each defendant (s). It may be served upon the defendant at any time before the return of the *scire facias*; or even upon the return day, provided it be before the rising of the Court (t). Call at the sheriff's office at the return of the writ for the return, and if the sheriff have returned *scire feci* (u), then, on or after the return day, if the original proceedings were by summons, *capias*, or detainer, or the *quarto die post* if they were by original (x), make out a memorandum for a rule to appear upon plain paper (y), and enter it with the clerk of the rules; pay him 6d. This is a four day rule (z); and if at the expiration of it no appearance has been made or entered, then enter the proceedings upon a roll (a); (see Vol. 1, 222); take it to the clerk of the judgments, who will sign judgment; pay him 2s.; then file the *scire facias* and return with the *custos brevium*, and sue out execution.

Where the defendant cannot be summoned by reason of his residing out of the county into which the *scire facias* issues, or otherwise,—Prepare a notice (b), stating the issuing of the *scire facias*, and when it was left at the sheriff's office, and the purpose for which it was left. Serve it, or use your best endeavours to serve it as long a time as possible before the return day. Call at the sheriff's office for the writ on or after the return day, and get the writ and sheriff's return of *nihil* (c). Make out a memorandum for a rule to appear on plain paper, and enter it with the clerk of the rules; pay him 6d. This is a four day rule (d). If no appearance has been made or

(r) See *Jackson v. Flam*, 1 Dowl. P. C. 515; *Sabine v. Field*, 1 C. & M. 466; and the cases as to bail, ante, Vol. 1, p. 433.

(s) See form of summons, Chit. Forms, 550.

(t) *Clarke v. Bradshaw*, 1 East, 86; *Webb v. Harvey*, 2 T. R. 757; *Obrian v. Frazier*, 1 Str. 644. See *Wright v. Page*, 2 W. Bl. 837; *Barr v. Satchwell*, 2 Str. 813. In a late case, the Court held the sheriff liable to an action for damages,

for not summoning a party, when he might have done so. MSS. 1831.

(u) See the form, Chit. Forms, 551.

(x) *Sharp v. Clark*, 13 East, 391.

(y) See the form, Chit. Forms, 519.

(z) See *Wathen v. Beaumont*, 11 East, 272.

(a) See the form, Chit. Forms, 553.

(b) See the form, Chit. Forms, 551.

(c) See the form, Chit. Forms, 551.

(d) See *Wathen v. Beaumont*, 11 East, 272.

entered in eight days from the return day, prepare an affidavit (e) of the issuing of the scire facias and the sheriff's return thereto, and of the service of the notice on defendant, or the due endeavours to serve it. At the expiration of the eight days after the return of the writ, or in a reasonable (f) time afterwards, move the Court or apply to a Judge on this affidavit for leave to sign judgment, and the Court will grant the rule, or the Judge will grant his fiat for the rule for judgment accordingly. The rule is absolute in the first instance. Then enter the proceedings upon a roll (g). Take the Judge's fiat or rule of Court to the clerk of the judgments, who will sign judgment; pay him 2s. Then file the scire facias and return with the *custos brevium*, and sue out execution (h). If the defendant was not summoned, it seems that he may, notwithstanding judgment against him, still have advantage of any matter he might have pleaded to the scire facias, either on an *audita querela* (i), or by motion to the Court (k), or even by application to a Judge at chambers in vacation.

Upon a scire facias to have execution of a judgment against two, if one be returned summoned, and *nihil* be returned as to the other, or that he is dead, and the one summoned make default, the plaintiff may have judgment against the party summoned, for the entirety (l).

If a *sci. fa.* be brought against the personal representatives, to revive a judgment in case of death, and *nihil* be returned, the plaintiff may sue out a *testatum sci. fa.* against the heir and terretenants (m).

As to the amendment of a scire facias, see post, Book 4, Part 1, Chap. 28.

*Appearance.*] Let the defendant's attorney give a written notice to the attorney or agent of the plaintiff, that he appears for the defendant. This will be now sufficient in all cases in proceeding by scire facias, and no appearance is filed. (*R. H. 2 W. 4, r. 82*) (n).

*Declaration.*] As soon as the defendant has appeared, you may declare against him. Engross your declaration on plain paper, charge for it, and indorse upon it the notice to plead, and deliver it to the defendant's attorney (o). It should seem, that the 2 W. 4, c. 39, and the rules of M. T. 3 W. 4, which were framed to meet the enactments of that statute, do not apply to proceedings upon writs of scire facias; and, consequently, the rules as to declaring and giving

(e) See form, Chit. Forms, 552.

(f) *Wood v. Moseley*, 1 Dowl. P. C. 513.

(g) See form, Chit. Forms, 553.

(h) See the former mode of proceeding by two writs of scire facias, where you did not intend that the defendant should be summoned.

(i) *Lampton v. Collingwood*, 1 Salk. 262, 1 Ld. Raym. 27, S. C.

(k) *Ludlow v. Lennard*, 2 Ld. Raym. 1296; *Anon.* 1 Salk. 93. See *Dodd v. Beckman*, 1 Ld. Raym. 445; *Wharton*

*v. Richardson*, 2 Str. 1075; *Holt v. Frank* 1 M. & Sel. 199.

(l) 1 Ro. Abr. 890, S. pl. 1, 2.

(m) *Eyres v. Taunton*, Cro. Car. 313; *Panton v. Terretenants of Hall*, Carth. 105.

(n) See forms of notice, Chit. Forms, 557.

(o) See forms of declaration, Chit. Forms, 557, 558; and see 2 Saund. 72 t; *Ward v. Gannell*, 3 Wils. 154; and of notice to plead, Chit. Forms, 559.

the notice to plead, which existed before that statute and rules, must be still regarded. The declaration should be intitled of the term in which the writ of *scire facias* was returnable, or of the term of which defendant appeared. The rules as to the time for pleading, and as to when the defendant will be entitled to an imparlance, are, it seems, the same as those noticed, *ante*, 586, in a *replevin* suit.

*Plea.*] As soon as you have declared, rule the defendant to plead, and demand a plea, in the same manner as in ordinary cases (*p*), excepting that, in *scire facias* against bail, Sunday or a *dies non* is not reckoned as one of the four days given by the rule to plead, even when it is not the last day of the four (*q*). It should seem that the enactment of the 2 *W. 4*, c. 39, s. 11, as to pleading between the 10th August and 24th October, and the rule of *M. T. 3 W. 4*, r. 12, framed to meet it (*ante*, Vol. 1, 195), do not apply to proceedings in *scire facias*. *Engross your plea on plain paper, and deliver it to the plaintiff's attorney or agent* (*r*). If the defendant have been summoned, and he neglect to appear and \*plead, he is for ever after barred from availing himself of any matter which he might have pleaded (*s*); although, if not summoned, we have seen that he would be relievable either by *audita querela*, or upon motion. (*Ante*, 614) (*t*).

*Issue.*] The issue is in all cases made up by the attorney. (*R. T. 12 W. 3*, a) (*u*). If it be an issue of fact, indorse on it the notice of trial, as in ordinary cases.

*Trial, &c.*] Proceed to trial as in ordinary cases (*x*). The jury find the affirmative or negative of the issue; but they cannot give damages for the delay of execution (*y*). The plaintiff may be nonsuit, as in other cases (*z*).

*Get the nisi prius record from the associate, and indorse the postea upon it, if it be not already indorsed by the associate* (*a*); and *sign judgment and proceed to execution, as in ordinary cases*. (See Vol. 1, 318) (*b*).

*Costs.*] Before the recent act, 3 & 4 *W. 4*, c. 42, the plaintiff was

(*p*) See Chit. Forms, 109, 110.  
(*q*) *Wathen v. Beaumont*, 11 East, 271; *Anon.* 1 Dowl. P. C. 142; *Fraser v. Müller*, Id. 141.

(*r*) See as to pleas in *scire facias*, 6 Bac. Abr. Sci. Fa. E.; 2 Saund. 72 t, u, 12, n. (19), 6, 7 a, 9 a, b, 10, 11; and a form of plea and replication, Chit. Forms, 560, 561.

(*s*) *Cooke v. Berry*, 1 Wils. 98.

(*t*) See form of entry of judgment by default, Chit. Forms, 560; and of execution thereon, Id. 555, 556.

(*u*) See as to the form, Chit. Forms, 561.

(*x*) See Chit. Forms, 561.

(*y*) *Henriques v. Dutch East India Company*, 2 Ld. Raym. 1532, 2 Str. 807, S. C.; *Knor v. Costello*, 3 Bur. 1791. The 3 & 4 *W. 4*, c. 42, ss. 28, 29, 30, do not apply to proceedings by *scire facias*.

(*z*) *O'Mealy v. Wilson*, 1 Camp. 484.

(*a*) See as to the form, Chit. Forms, 561; 9 Went. 552.

(*b*) See as to the form of entry of judgment on roll, Chit. Forms, 562.

not entitled to costs on a *scire facias*, until after plea pleaded (c). But now, by the 34th section of that act, "in all writs of *scire facias*, the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined." By 8 & 9 W. 3, c. 11, s. 3, if the plaintiff be nonsuit, or discontinue, or if a verdict pass against him, the defendant shall be entitled to costs. Also, the plaintiff will not be allowed to quash his own writ of *scire facias* after the defendant has appeared, except on payment of costs. (*R. H. 2 W. 4, r. 78*) (d). The above statutes do not, it seems, extend to a *scire facias* to repeal a patent (e). If costs be given where they should not, the judgment may be reversed as to that, and affirmed as to the residue (f).

*Execution.*] The execution is the same, and nearly in the same form, as in ordinary cases (g). In the case of a *scire facias* to revive a judgment, the writ of execution must be founded on the judgment in the *scire facias*, even in cases where the *scire facias* may have been unnecessary (h). And the same of course in all other cases. As to execution against bail on a *scire facias*, see Vol. 1, p. 434 (i); and as to the manner in which the execution must pursue the judgment, see Vol. 1, p. 376. Upon a *scire facias* against bail, you may have one writ of execution against both, or separate writs against each; for the recognizance is joint and several (k).

*Second scire facias.*] After reviving a judgment by *scire facias*, if a year and day pass before execution, the judgment must be again revived by *scire facias*, before the execution can be sued out (l). And the same, in the cases of death, marriage, &c. after *scire facias* sued out, the judgment must be again revived before execution (m).

(c) *Pocklington v. Peck*, 1 Stra. 638; Saund. 72 u; 8 & 9 W. 3, c. 11, s. 3.

(d) See 1 B. & Ald. 486.

(e) *Rex v. Miles*, 7 T. R. 367.

(f) *Bellew v. Aylmer*, 1 Str. 188.

(g) See 8 & 9 W. 3, c. 11, s. 3. See form of *fi. fa.* or *ca. sa.* after *scire facias* to revive a judgment, Chit. Forms, 555, 556; the like for executor or administrator, on judgment obtained by plaintiff deceased, Id. 570; of *fi. fa.* against executor or administrator, on judgment obtained against defendant deceased, Id.:

of execution for or against executor or administrator, where plaintiff or defendant died between interlocutory and final judgment, Id. 575.

(h) 1 Bingh. 133.

(i) See form of *fi. fa.* or *ca. sa.*, Chit. Forms, 325 to 328.

(k) 1 Ro. Abr. 888. See *Sainsbury v. Pringle*, 10 B. & C. 751.

(l) 2 Sellon, 189. See the form, Chit. Forms, 549.

(m) *Hardisty v. Baring*, 2 Salk. 598; 2 Sellon, 196.

## BOOK III.

### PART II.

#### PROCEEDINGS IN ACTIONS BY AND AGAINST PARTICULAR PERSONS.

#### CHAPTER I.

##### PROCEEDINGS AGAINST PEERS AND MEMBERS OF PARLIAMENT.

SECT. 1. *Proceedings against, in ordinary Cases*, 617.

2. *Proceedings against Members subject to the Bankrupt Laws*, 618.

##### SECT. 1.

##### *Proceedings against, in ordinary Cases.*

PEERS, peeresses, and members of the House of Commons, we have seen, cannot be holden to bail; (*Vol. 1, p. 65*); nor can they be taken in execution upon a *capias ad satisfaciendum* (*Vol. 1, p. 409*). Consequently, if they be sued, they must not be held to bail; and judgment against them must not be executed by *feri facias* or *elegit*. An unprivileged person in custody in execution, who becomes a peer or member of parliament, is entitled to his discharge on motion (*a*).

Formerly, peers and peeresses could have been proceeded against only by original, summons, and *distringas* (*b*), even when sued jointly with others. Where a peer was sued jointly with others, by bill of

(a) *Phillips v. Wellesley*, 1 Dowl. P. Bl. 267, Id. 299, S. C.; *Hosier v. Arundel*, 3 B. & P. 7; *Couche v. Arundel*, 3 C. 9; *Ex p. Burton*, Id. 14.

(b) See *Lonsdale v. Littledale*, 2 H. East, 127.

Middlesex, the Court set aside the proceedings as against the peer (c). members of the House of Commons might have been sued, either in this manner by original, summons, and *distringas*, or by original bill and summons. If either a peer or member of the House of Commons, however, were in the actual custody of the marshal, he might have been proceeded against by bill, in the same manner as other prisoners, and a summons need not have been issued; but he could not be charged with a bailable action, nor afterwards charged in execution (d). There was also a particular mode of proceeding, which might have been adopted against members of parliament who were traders and subject to the bankrupt laws (e). Now, however, these modes of proceeding are materially altered, by the recent act of 2 W. 4, c. 39, ss. 21, 1, 3, & 4; and the *process to enforce the appearance*, in a personal action, of a person entitled to privilege of peerage or of parliament, is the same as in ordinary cases (which has been already fully noticed, ante, Vol. 1, Book I. Part II., Chap. 1, 2). There seems no occasion to state in the process that the defendant is entitled to privilege of peerage or of parliament (f). It is to be remembered, however, that he is still privileged from being holden to bail (Ante, Vol. 1, p. 65).

The remaining proceedings in the cause are the same as are already stated, Vol. 1, 183 to 439, excepting that the execution must be by *feri facias* or *elegit*, and not by *ca. sa.*, as already mentioned, Vol. 1, p. 409. A doubt formerly existed, whether, if a person were taken in execution, and set at liberty by privilege of either house of parliament, the party at whose suit such execution was pursued, was for ever barred and disabled from suing forth a new writ of execution; but, by 2 Jac. 1, c. 13, s. 2, the plaintiff may sue forth and execute a new writ of execution, as if the former execution had not taken place (g).

## SECT. 2.

### *Proceedings against Members of Parliament subject to the Bankrupt Laws.*

By stat. 6 G. 4, c. 16, ss. 9 & 10, if any creditor or creditors of a trader having privilege of parliament, to such amount as is declared requisite to support a commission, shall file an affidavit or affidavits in any Court of record at Westminster, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as

(c) *Briscoe v. Earl of Egremont*, 3 M. & Sel. 88; *Lady Napier's case*, Tidd, 118, 145.

(d) *Jackson v. Mackreth*, 5 T. R. 361.

(e) Vide 6 G. 4, c. 16, ss. 9 & 11.

(f) It is no ground for plea in abate-

ment, that a defendant sued as a peer is also described as having privilege of parliament. *Cantwell v. Earl Stirling*, 1 M. & Scott, 297, 8 Bing. 174, S.C.

(g) See *Phillips v. Wellesley*, 1 Dowl. P. C. 9; *Ex p. Burton*, Id. 14.

he or they verily believe, is such trader as aforesaid, and shall sue out of the same Court a [summons] (2 W. 4, cap. 39, s. 9) (h) against such trader, and serve him with a copy of such summons,—if such trader shall not, within one calendar month after personal service of such summons, pay, secure, or compound for such debt or debts to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties, as any of the Judges of the Court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action or actions, together with such costs as shall be given in the same (i), and, within one calendar month next after personal service of such summons, cause an appearance or appearances to be entered to such action or actions in the proper Court or Courts in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons, and any creditor or creditors of such trader to such amount as aforesaid, may sue out a commission against him, and proceed thereon in like manner as against other bankrupts; but such person shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases thereby made felony (k).

It is optional, of course, with the plaintiff in this case to adopt the remedy here given, or to proceed as directed in the first section of this chapter.

(h) And see the form prescribed by the act, Chit. Forms, 506.

(i) *Hunter v. Campbell*, 3 B. & Ald. 273; 1 Chit. Rep. 731, S. C.; *Jameson v. Campbell*, 5 B. & Ald. 250; 1 Bing.

320, S. C. in error.

(k) See Arch. Bkt. L. 299; and see as to the form of the affidavit, Chit. Forms, 619.



## CHAPTER II.

## PROCEEDINGS BY AND AGAINST CORPORATIONS AND HUNDREDS.

## SECT. 1.

*Proceedings by and against Corporations.*

CORPORATIONS aggregate (to which alone this section has reference) cannot sue or defend otherwise than by attorney, which attorney must be appointed under their common seal (a).

In actions *by* corporations, they may hold to bail, and proceed in the same manner as individuals (b). Even in ejectment they may now proceed in the ordinary way, without executing a power of attorney authorizing a third person to enter and make a lease on the land, as used to be the practice (c). They cannot, however, sue as a common informer (d). It may be as well observed that a corporation may be plaintiffs in assumpsit, at least upon an executed consideration, as for use and occupation, where the tenant has held the premises under them and paid rent (e); and in a late case, it was held that the London Gas Company might sue in assumpsit for gas supplied, although there was no contract by deed under their seal (f). A corporation must be described in all legal proceedings by their corporate name (g). Frequently, acts of parliament enable corporate bodies to sue, and others to sue them, in the names of their clerks, treasurers, &c. for the time being.

Proceedings *against* corporations aggregate must, formerly, have been by original, summons, or attachment, and *distringas*; and the mode of proceeding was the same as it formerly was in actions against peers, excepting that the plaintiff was not authorized by any statute to enter an appearance for the defendants, but he must have proceeded to compel an appearance by levying issues on successive writs of *distringas*, moving to increase them, and from time to time to sell them, as directed, *ante*, p. 582, 583. Now, however, by the 2 IV. 4, c. 39, ss. 21, 1, 3, the process against corporations aggregate, to enforce their appearance in a personal action, is the same as in

(a) Co. Lit. 66. b. Vol. 1, p. 33.

(b) See Chit. Forms, 587.

(c) Run. Eject. 150; Ros. 325.

(d) *Weavers' Company v. Forrest*, 2 Str. 1241.

(e) *Harber Surgeons of London v. Pelson*, 2 Lev. 252; *Dean of Rochester v.*

*Pierce*, 1 Camp. 466; *Mayor of Stafford v. Till*, 12 Moore, 260, 4 Bing. 75, S. C.

(f) *London Gas Light Company v. Nicholls*, 2 Car. & P. 365; see also *London Water Works Company v. Bailey*, 4 Bing. 203, 12 Moore, 532, S. C.

(g) 1 Leach, 4th ed. 253.

ordinary cases, by writ of summons, or summons and *distringas* (*h*). The corporate name must be inserted accurately in the writ. The service of the writ may be on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary, of such corporation. (2 *W. 4*, c. 39, s. 13; *Vol. 1*, 450). The corporation or any members of it cannot be holden to bail. (*Vol. 1*, p. 73.) Assumpsit cannot be supported against a corporation, which cannot contract by parol, except in the case of bills or notes, where the power of drawing and accepting them is recognised by statute, and other contracts, sanctioned by particular legislative enactments (*k*). The remaining proceedings are the same as in ordinary cases. See *ante*, *Vol. 1*, p. 183 to 439.

## SECT. 2.

### *Proceedings against Hundredors.*

The statute now in force, by which hundredors are liable for damages, is the 7 & 8 *G. 4*, c. 31. The statute 7 & 8 *G. 4*, c. 27, repeals all the prior statutes relative to such liability. Hundredors are now no longer, as formerly, liable in cases of robbery, arson, killing or maiming cattle, cutting down or destroying trees, destroying turnpikes, or works on navigable rivers, cutting hop binds, destroying corn to prevent it from being exported, destroying corn going to market, or injuring horses or carriages so conveying it, and wounding revenue officers; and hundredors, in short, are now only liable for damage done by rioters acting *feloniously* (*l*).

*Statute relating to.*] The 7 & 8 *G. 4*, c. 31, s. 2, enacts, "That, if any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach house, outhouse, warehouse, office, shop, mill, malt house, hop oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed, or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, draining, or working any mine, or any stailth, building, or erection used in conducting the business of any mine, or any bridge, waggon way, or trunk for conveying minerals from any mine, shall be *feloniously* demolished, pulled down, or destroyed, wholly or in part, by any persons *riotously* and *tumultuously* assembled together (*m*), in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be de-

(*h*) See a form of the direction of the writ, *Chit. Forms*, 587.

(*i*) 1 *Rol. Rep.* 82; *London Water Works Company v. Bailey*, 4 *Bing.* 283, 12 *Moore*, 532; *Mayor of Stafford v. Till*, 4 *Bing.* 77, 12 *Moore*, 260, *S.C.*

(*k*) *Murray v. East India Company*, 5 *B. & Ald.* 204; *Broughton v. Company*

of *Manchester Water Works*, 3 *B. & Ald.* 1; 6 *Vin. Ab.* 317; 1 *Chit. Pl.* 5th ed. 121.

(*l*) See 3 *Burn's J.*, 26th ed., tit. "*Hundredors*."

(*m*) See the law and cases in *Chit. Gen. Pract. of the Law*, 1 ed. 577.

nominated, in which any of the said offences shall be committed, shall be liable to yield *full compensation* to the person or persons damaged by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any *damage*, which may at the same time be done by any such offenders, to any *fixture, furniture, or goods* whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid."

Sect. 3 provides and enacts, "That no action or summary proceeding, as hereinafter mentioned, shall be maintainable by virtue of this act, for the damage caused by any of the said offences, unless the person or persons damaged, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall, within seven days after the commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance before him to prosecute the offenders when apprehended: Provided also, that no person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence."

Sect. 4 enacts, "That no process for appearance in any action to be brought by virtue of this act against any hundred or other like district shall be served on any inhabitant thereof, except on the high constable or some one of the high constables, (if there be more than one), who shall, within seven days after such service, give notice thereof to two justices of the peace of the county, riding, or division in which such hundred or district shall be situate, residing in or acting for the hundred or district; and such high constable is hereby empowered to cause to be entered an appearance in the said action, and also to defend the same on behalf of the inhabitants of the hundred or district, as he shall be advised; or, instead of defending the same, it shall be lawful for him, with the consent and approbation of such justices, to suffer judgment to go by default; and the person upon whom, as high constable, the process in the action shall be served, shall, notwithstanding the expiration of his office, continue to act for all the purposes of this act, until the termination of all proceedings in and consequent upon such action; but, if such person shall die before such termination, the succeeding high constable shall act in his stead."

Sect. 5 enacts, "That, in any action to be brought by virtue of this act against the inhabitants of any hundred or other like district, or against the inhabitants of any county of a city or town, or of any such liberty, franchise, city, town, or place, as is hereinafter mentioned, no inhabitant thereof shall, by reason of any interest arising from such inhabitancy, be exempted or precluded from giving evidence either for the plaintiff or for the defendants."

Sect. 6 enacts, "That, wherever the plaintiff in any such action shall recover judgment, whether after verdict or by default or otherwise, no writ of execution shall be executed on any inhabitant of the hundred or other like district, nor on such high constable; but the sheriff, upon the receipt of the writ of execution, shall (on payment of the fees of 5s. and no more) make his warrant to the treasurer of the county, riding, or division, in which such hundred or other like district shall be situate, commanding him to pay to the plaintiff the sum by the said writ directed to be levied; and such treasurer is hereby required to pay the same, as also any other sum ordered to be paid by him by virtue of this act, out of any public money which shall then be in his hands, or shall come into his hands before the next general or quarter sessions of the peace for the said county, riding, or division; and, if there be not sufficient money for that purpose before such sessions, he shall give notice thereof to the justices of the peace at such sessions, who shall proceed in the manner hereinafter mentioned."

Sect. 7. 'And, for the purpose of indemnifying the high constable and the county treasurer,' it is enacted, "That, if such high constable of the hundred or other district sued, shall produce and prove before any two justices of the peace of the county, riding, or division, residing in or acting for such hundred or district, an account of the just and necessary expenses which he shall have incurred in consequence of any such action as aforesaid, such justices shall make an order for the payment thereof upon the treasurer of the county, riding, or division in which such hundred or district shall be situate; and if in any such action judgment shall be given against the plaintiff, the high constable shall in like manner be reimbursed for the just and necessary expenses by him incurred in consequence of such action, over and above the taxed costs to be paid by the plaintiff in such case; and, if it shall be proved to any two such justices that the plaintiff in the action is insolvent, so that the high constable can have no relief as to such taxed costs, such justices shall make an order upon the treasurer of the county, riding, or division as aforesaid, for the payment of the amount of such taxed costs; and the justices of the peace at the next general or quarter sessions of the peace, to be holden for any such county, riding, or division, or any adjournment thereof, shall direct such sum or sums of money as shall have been paid or ordered to be paid by the treasurer by virtue of any such warrant or order as hereinbefore mentioned, to be raised on the hundred or other like district against the inhabitants of which any such action shall have been brought, over and above the general rate to be paid by such hundred or district in common with the rest of the county, riding, or division, under the acts relating to county rates; and such sum or sums shall be raised in the manner directed by those acts, and shall be forthwith paid over to the treasurer."

Sect. 10 enacts, "That, if any high constable shall refuse or neglect to exhibit or give such notice as is required in any of the cases aforesaid, it shall be lawful for the party damaged to sue him for the amount of the damage sustained, such amount to be recovered by an action on the case, together with full costs of suit."

Sect. 11 enacts, " That every action or summary claim to recover compensation for the damage caused to any church or chapel by any of the offences in this act mentioned, shall be brought in the name of the rector, vicar, or curate of such church or chapel; or, in case there be no rector, vicar, or curate, then in the names of the church or chapelwardens, if there be any such, and if not, in the name or names of any one or more of the persons in whom the property of such chapel may be vested; and the amount recovered in any such case shall be applied in the rebuilding or repairing such church or chapel; and where any of the offences in this act mentioned shall be committed on any property belonging to a body corporate, such body may recover compensation against the hundred or other like district, in the same manner, and subject to the same conditions, as any person damnified is by this act enabled to do: Provided always, that the several conditions which are hereinbefore required to be performed by or on behalf of any person damnified, may, in the case of a body corporate, be performed by any officer of such body on behalf thereof."

Sect. 12. ' And whereas the offences for which compensation is granted by virtue of this act may be committed in counties of cities and towns, or in such liberties, franchises, cities, towns, and places, as either do not contribute at all to the payment of any county rate, or contribute thereto, but not as being part of any hundred or other like district; and it is expedient to provide for all such cases; ' it is therefore enacted, " That, where any of the offences in this act mentioned shall be committed in a county of a city or town, or in any such liberty, franchise, city, town, or place, the inhabitants thereof shall be liable to yield compensation in the same manner and under the same conditions and restrictions in all respects as the inhabitants of the hundred; and every thing in this act in anywise relating to a hundred, or to the inhabitants thereof, shall equally apply to every county of a city or town, and to every such liberty, franchise, city, town, and place, and to the inhabitants thereof; and where the justices of the peace of the county, riding, or division are excluded from holding jurisdiction in any such liberty, franchise, city, town, or place, in every such case all the powers, authorities, and duties by this act given to or imposed on such justices, shall be exercised and performed by the justices of the peace of the liberty, franchise, city, town, or place in which the offence shall be committed; and where the offence shall be committed in a county of a city or town, all the like powers, authorities, and duties shall be exercised and performed by the justices of the peace of such county of a city or town; and in every action to be brought, or summary claim to be preferred under this act against the inhabitants of a county of a city or town, or of any such liberty, franchise, city, town, or place, the process for appearance in the action, and the notice required in the case of the claim, shall be served upon some one peace officer of such county, liberty, franchise, city, town, or place; and all matters which by this act the high constable of a hundred is authorized or required to do in either of such cases, shall be done by the peace officer so served, who shall

have the same powers, rights, and remedies as such high constable has by virtue of this act, and shall be subject to the same liabilities; and shall, notwithstanding the expiration of his office, continue to act for all the purposes of this act until the termination of all proceedings in and consequent upon such action or claim; but if he shall die before such termination, his successor shall act in his stead."

Sect. 13. 'And, for securing the due execution of writs in the Cinque Ports, and in places where writs are directed to other officers than the sheriff, and in liberties where the sheriff is not warranted in executing writs,' it is enacted, "That all other such officers to whom any writ of execution under this act shall be directed, by whatsoever name they shall be known, shall have the same power of granting a warrant for payment of the sum by such writ directed to be levied as is hereby given to the sheriff in case of a writ of execution directed to him; and that every sheriff and other such officer as aforesaid shall have authority to grant his warrant under this act, notwithstanding the offence shall have been committed in, or the treasurer or other person to whom such warrant shall be directed shall reside or be in, any liberty where the sheriff or officer is not warranted in executing writs."

Sect. 14. 'And as to the mode of payment and reimbursement under this act in such liberties, franchises, cities, towns, and places as contribute to the payment of the county rate, but not as being part of any hundred,' it is enacted, "That the warrant of the sheriff or other officer upon any writ of execution against the inhabitants of any such liberty, franchise, city, town, or place, and every order of justices for payment to the party damnified therein, or to the peace officer or inhabitants thereof, by virtue of this act, shall be directed to the treasurer of the county, riding, or division in which such liberty, franchise, city, town, or place shall be situate, who is hereby required to pay the same; and the justices of the peace of such county, riding, or division, at their next general or quarter sessions of the peace, or any adjournment thereof, shall direct such sum or sums of money as shall have been so paid or ordered to be paid by the treasurer, to be raised on such liberty, franchise, city, town, or place, over and above the general rate to be paid by the same in common with the rest of the county, ridings, or division, under the acts relating to county rates; and such sum or sums shall be raised in the manner directed by those acts, and shall be forthwith paid over to the treasurer."

Sect. 15. 'And, as to the mode of payment and reimbursement under this act in counties of cities and towns, and in such liberties, franchises, cities, towns, and places as do not contribute to the payment of the general county rate;' it is enacted, "That all sums of money payable either by virtue of any warrant of the sheriff or other officer, or of any order or orders arising out of any action or summary claim against the inhabitants of any county of a city or town, or of any such liberty, franchise, city, town, or place, shall be paid out of the rate (if any) in the nature of a county rate, or out of any fund applicable to similar purposes, where there is such a rate or fund

therein, by the treasurer or other officer having the collection or disbursement of such rate or fund; and where there is no such rate or fund in such county, liberty, franchise, city, town, or place, the same shall be paid out of the rate or fund for the relief of the poor of the particular parish, township, district, or precinct therein, where the offence was committed, by the overseers or other officers having the collection or disbursement of such last-mentioned rate or fund; and in every such case the warrant and orders shall be directed and delivered to such treasurer, overseers, or other officers respectively, instead of the treasurer of the county, riding, or division, as the case may require."

By sections 8 & 9, where the damage does not exceed 30*l*., the party injured must proceed before justices at a special petty session.

*Proceedings, &c. under the statute.*] Previously to the commencement of the action, there are, by the 3rd section of the above act, certain acts required of the party injured, such as that he, or his servant, having the care of the property injured, shall, within seven days after the commission of the offence, go before some near resident (*n*) justice, and state on his oath the names of the offenders, and submit to an examination, and enter into a recognizance to prosecute. (*Ante*, 622). The examination of the party must take place within seven days exclusively of the day on which the offence was committed (*o*).

All the persons damnified, who have any knowledge of the circumstances of the offence, or all the servants who had the care of the property damaged, and have any knowledge of such circumstances, should go before the justice to be examined (*p*). It is not necessary that both the person injured and servant be examined (*q*); if the former has no knowledge of the circumstances of the offence, being such a knowledge as is available in evidence, then the servant or servants who had the care of the property should be examined (*r*). Where the reversioner sued on the Black Act, his own oath was held sufficient, without examining the tenant or his servant (*s*). The party is not, it seems, in his examination, bound to state his suspicion respecting the offender (*t*). It has been held that the swearing before a justice to a deposition previously prepared, is a sufficient submission to examination within the meaning of the act, if the justice require nothing further (*u*). The examinations need not be taken down in writing (*x*), though it is best they should be so.

(*n*) See Bull. N. P. 186.

(*o*) *Pellew v. Hundred Wonford*, 9 B. & C. 135.

(*p*) See *Duke of Somerset v. Hundred Mere*, 4 B. & C. 167, 6 D. & R. 247, S. C.; *Nesham v. Armstrong*, 1 B. & Ald. 146; But see *Lowe v. Inhabitants of Broxtowe*, 3 B. & Adol. 550.

(*q*) *Rolfe v. Hundred Elthorne*, 1 M. & M. 185.

(*r*) See *Rolfe v. Hundred Elthorne*, 1 M. & M. 185; *Duke of Somerset v. Hun-*

*dred Mere*, 4 B. & C. 167, 6 D. & R. 247, S. C.

(*s*) *Pellew v. Hundred Wonford*, 9 B. & C. 134.

(*t*) *Pellew v. Hundred Wonford*, 9 B. & C. 134.

(*u*) *Lowe v. Inhabitants of Broxtowe*, 3 B. & Adol. 550.

(*x*) *Graham v. Hundred Beantree*, B. N. P. 186. See several forms in Chit. Gen. Prac. of the Law, 1 ed. 580, 581.

The action must be brought within three calendar months after the offence committed (y). The day of the offence would, it seems, be reckoned exclusive (z).

Formerly, the mode of proceeding to compel an appearance in this action was by original, attachment, and *distringas*, in the same manner as it used to be against corporations. (See *ante*, 620). Now, however, by the 2 W. 4, c. 39, ss. 21, 1, 3, the process against hundredors to enforce their appearance, is the same as in ordinary cases, viz. by summons, or summons and *distringas*. The writ must be against "the inhabitants of the hundred," or other like district generally, and not against any of them by name; otherwise, if the mistake be carried into the declaration, it would be bad even in arrest of judgment (a).

The writ must be served upon the high constable, or one of the high constables of the hundred, or like district (2 W. 4, c. 39, s. 13; *ante*, Vol. 1, p. 450) in which the offence happened; who should, within seven days after such service, give notice thereof to two justices residing in and acting for the hundred, &c. (7 & 8 G. 4, c. 31, s. 4; *ante*, 622). If the writ be against the inhabitants of a county of a city or town, or the inhabitants of a franchise, liberty, city, town, or place not being part of a hundred or other like district, it may be served on any peace officer thereof. (2 W. 4, c. 39, s. 13; *ante*, Vol. 1, p. 450).

The high constable, upon being served with the summons, must enter an appearance, and defend the action for and on behalf of the inhabitants of the hundred or other like district, &c., as he may be advised. (7 & 8 G. 4, c. 31, s. 4, *ante*, 622). If he do not, however, the plaintiff may proceed as in other cases, and enter it for them. This appearance must be entered with the clerk of the common bail on or before the expiration of eight days after the service of the writ, inclusive of such service, as directed, Vol. 1, p. 454.

As to the form of the declaration, see 2 Saund. 376, 376 b, e, f, 377 f, 379; 2 Chit. Pleading, 827 a. The plaintiff cannot declare until the defendants have appeared, and then of course it is absolutely; the declaration is then delivered or filed as in ordinary cases.

The constable may allow judgment to go by default, with the consent and approbation of the two justices. (See 7 & 8 G. 4, c. 31, s. 4, *ante*, 622).

The defendant may plead not guilty (b).

As this is not a penal action, it is within the statutes of *jeofails*, and is also amendable even after issue joined, in the same manner as any other civil action (c).

Hundredors are made competent witnesses by the 7 & 8 G. 4, c. 31, s. 5, *ante*, 622.

(y) See the 3rd section, *ante* 622.

(z) See *Pellew v. Hundred Worsford*, 9 B. & C. 135. See *vide post*; *Norris v. The Hundred of Gawtry*, Hob. 139; 2 Roll. Abr. 520 a, pl. 8; 1 Brownl. 156.

(a) See 2 Saund. 376 f; Id. 375; *Johnson v. Jackson*, 2 D. & R. 439; 1 B. &

C. 304. See the form, Chit. Forms, 587.

(b) See Vid. Ent. 211; Lil. Ent. 296; Hans. Ent. 4; 1 And. 158.

(c) *Beacroft v. Hundreds of Burnham and Stone*, 3 Lev. 347; *Andr. 115*; *Merrick v. Hundred of Ossulston*, Hardw. 409.



The plaintiff cannot proceed by action, unless his loss exceed 30*l.*; for a loss amounting to that sum or under, his remedy is by a summary proceeding before justices at a special petty session. (*See the 7 & 8 G. 4, c. 31, ss. 8, 9*).

The plaintiff in this action is entitled to costs if he recover (*d*). So the hundred will, it seems, be entitled to costs if the plaintiff be nonsuit, &c. as in other cases (*e*).

The execution is by *feri facias* against the inhabitants of the hundred, &c. generally, directed to the sheriff of the county in which such hundred, &c. is situate, and indorsed thus: "The within damages are to be levied according to the statute, 7 & 8 G. 4, c. 31," adding the attorney's name (*f*). The 13th section of the act, *ante*, 625, makes provision for executing writs in certain places. When this writ is delivered to the sheriff, instead of levying the amount on any of the inhabitants of the hundred, &c., he must proceed as directed by the 6th section of the act, *ante*, 622. The 7th section of the act points out the mode of reimbursing the high constable for his expenses in defending the action. The 14th and 15th sections, *ante*, 625, point out the mode of reimbursements in towns, &c., not in a hundred, but contributing to the country rate, and *vice versa*.

(*d*) 2 Saund. 378*b*; *Hatchliffe v. Eden*, Burr. 1723.  
Cowp. 485; *Witham v. Hill*, 2 Wils. 91.

(*e*) *Gfetham v. Hundred Theele*, 3

(*f*) See the form of writ, Chit. Forms, 587.

## CHAPTER III.

## ACTIONS BY AND AGAINST ATTORNIES AND OFFICERS OF THE COURT, AND AGAINST THE MARSHAL.

- SECT. 1. *Actions by Attornies and Officers*, 629.  
 2. *Actions against Attornies and Officers*, 631.  
 3. *Actions against the Marshal for an Escape*, &c, 633.

## SECT. I.

*Actions by Attornies and Officers.*

FORMERLY, attornies and officers of this Court had the right of suing here by *attachment of privilege*; and, having brought the defendant before the Court by that writ, they might have declared against him, and proceeded in the action as in ordinary cases. The amount of the cause of action was immaterial, attornies and officers, when plaintiffs, not being within the statutes relating to Courts of conscience (*a*), (unless they were expressly made liable thereto) provided they sued as attornies or officers, that is, by attachment of privilege (*b*).

But, if an attorney sued as executor or administrator (*c*), or sued jointly with others who were not privileged (*d*), even jointly with his wife in right of his wife (*e*), or if he had left off practice, (*see Vol. 1, 32*), or were uncertificated for one whole year before the writ issued (*f*): in these cases he was not entitled to privilege; and must have sued, not by attachment of privilege, but in the same manner as persons not privileged. If he sued by attachment of privilege, where he was not entitled to do so, it would have been error (*g*); or the Court, upon application, would have set aside the proceedings for irregularity (*h*). On the other hand, where he was entitled to sue by at-

(a) *Board v. Parker*, 7 East, 47; *Wiltshire v. Lloyd*, Doug. 382; *Gardner v. Jessop*, 2 Wils. 42; *Johnson v. Bray*, 2 B. & B. 698, 5 Moore, 622, S. C.

(b) See *Tagg v. Madan*, 1 B. & P. 629; *Parker v. Vaughan*, 2 Id. 29.

(c) *Newton v. Rowland*, 1 Ld. Raym. 533, 12 Mod. 316, S. C.

(d) *Molyn v. Cooke*, 1 Vent. 298. See *Ramsbottom v. Harcourt*, 4 M. & Sel. 585.

(e) *Drew v. Rose*, 2 Ld. Raym. 1398; Bro. Abr. Bille, pl. 2.

(f) *Reuder v. Bloom*, 10 Moore, 261, 3 Bing. 9, S. C. See *Skirrow v. Tagg*, 5 M. & Sel. 281; *Brooke v. Bryant*, 7 T. R. 25.

(g) *Drew v. Rose*, 2 Ld. Raym. 1398.

(h) *Semb. see Nabb v. Smith*, 5 M. & Sel. 324.

tachment of privilege, he might waive his right, if he wished, and sue in the ordinary way (i). If both plaintiff and defendant were attornies or officers of this Court, the defendant's privilege prevailed, and he must have been sued by bill, and not holden to bail (k); but, if the defendant were an attorney of another Court, the plaintiff's privilege prevailed, and he might sue him here by attachment of privilege (l), although he could not hold him to bail (m). Such was the privilege of an attorney plaintiff prior to the 2 W. 4, c. 39.

Now, however, the right of suing by this attachment of privilege is abolished by the 2 W. 4, c. 39, ss. 21, 1, 3, 4, and an attorney must in all cases sue in the same way as any other person must, viz. by writ of summons, or summons and *distringas*, in non-bailable cases, or by writ of *capias* in bailable cases, and which proceedings have been already fully noticed in the 1st Vol. of this work, Book I. Parts I. II.

Inasmuch as this statute thus abolishes the writ of attachment of privilege, so as to leave an attorney no option as to whether he will sue by it or not, it is conceived that his other privileges are not in anywise affected by the statute, and that those privileges still exist to the same extent as they did before the statute, when he sued by attachment of privilege (n). If he employs another attorney to bring the action he waives his privileges (o).

Where the action is for costs, a bill must, in general, be furnished to the client a month previously to the writ being sued out, as fully pointed out, Vol. 1, p. 44; and a copy of the bill must be kept, in order to be given in evidence at the trial. (Vol. 1, p. 51).

Bail is put in, &c. (see Vol. 1, p. 149, &c.), or an appearance entered (see Vol. 1, p. 454), as in ordinary cases.

The time within which the plaintiff must declare, as also the form of the declaration, is the same as in ordinary cases. (See Vol. 1, p. 183).

The plaintiff in transitory actions, suing by himself as an attorney (p), may lay the venue in Middlesex; and it cannot afterwards be changed upon the usual application by the defendant, as in ordinary cases (q).

The time limited for pleading, and all the remaining proceedings in the action, are the same as in ordinary cases.

(i) *Jackson v. Barnard*, 7 T. R. 35; *Hetherington v. Louth*, 2 Stra. 837.

(k) *Barber v. Palmer*, 6 T. R. 524; *Nichols v. Earle*, 8 Id. 395; *Hetherington v. Louth*, 2 Str. 837; *Ratcliffe v. Bealey*, Id. 1141.

(l) *Shorter v. Packhurst*, 1 W. Bl. 19; *Dauser v. Berryman*, 2 Id. 1325.

(m) *Pearson v. Henson*, 4 D. & R. 73. See *Jolliffe v. Langston*, 1 Ld. Raym. 342.

(n) *Meggison v. Cole*, MS. K. B. 11 June, 1833.

(o) *Hannington v. Page*, T. T. 1833, K. B. MS.

(p) Id.

(q) *Meggison v. Cole*, MS. K. B. 11 June, 1833; *Pope v. Redfearne*, 4 Bur. 2027; *Yeardley v. Roe*, 3 T. R. 573; See *Leves v. Shelly*, 7 Taunt. 146; *Mounsey v. Watson*, 7 B. & C. 683.

SECT. 2.

*Actions against Attornies and Officers.*

Formerly, attornies and officers of this Court must have been sued here by *bill* (r).

But, where the proceedings against an attorney or officer were at the suit of the king (s), (not being merely a *qui tam* action (t);) or if he were sued in *auter droit*, as executor or administrator, &c. (u); or if he were sued jointly with his wife (x), or with any other person not privileged (y); or if he were in custody for debt (z); or if he had left off practice (a), or had not taken out his certificate for one whole year (b): in all these cases he lost such privilege of being sued by bill as an attorney or officer, and might have been proceeded against, and holden to bail if necessary, as in ordinary cases. Though, if an attorney were sued together with a privileged person, as with a member of parliament, for instance, he did not lose his privilege (c). Also, if the plaintiff were an attorney or officer of this Court, and the defendant an attorney or officer of another Court, the plaintiff might have sued him here by attachment of privilege; but, if both plaintiff and defendant were attornies or officers of this Court, the latter must have been sued by bill. (*Ante*, p. 630). Also, if an attorney or officer of this or any other Court, were in the actual custody of the marshal, he must have been proceeded against in every respect as a prisoner, and had no privilege in this respect as an attorney or officer (d). An attorney or officer also might have waived this privilege of being sued by bill; and he was considered as doing so, by appearing to an action commenced in any other manner, if he were an attorney or officer of this Court; or by not pleading his privilege, if he were an attorney or officer of any other Court (e).

It seems, also, that an attorney, by entering into a bail bond, waived his privilege whether sued jointly or separately, as he must

(r) Bro. Abr. *Bills*, p. 29; *Comerford v. Price*, Doug. 313. But the clerks of the officers of the Court were not, it seems, entitled to this privilege; see *Willis v. Battershell*, 3 Salk. 283.

(s) 2 Ro. Abr. 274.

(t) *Britten v. Teasdale*, Barnes, 48; but see *Kirkham v. Whaley*, 1 Ld. Raym. 27, 1 Salk. 30, S. C.

(u) *Newton v. Rowland*, 1 Ld. Raym. 533, 12 Mod. 316, S. C.; *Anon.* 2 Sid. 157, Latch, 190; *Gage's case*, Hob. 177; Godb. 10; Dy. 24.

(x) *Robarts v. Mason*, 1 Taunt. 254; Dy. 377.

(y) *Branthwaite v. Blackerby*, 2 Salk. 544; *Molyn v. Cooke*, 1 Vent. 298; Dy. 277; 2 Ro. Abr. 274; *Townsend v. Duppa*, 1 Str. 610. *Sed quare.*

(z) *Byles v. Wilton*, 4 B. & Ald. 88.

(a) *Goldsmith v. Baynard*, 2 Wils. 232; *Dyson v. Birch*, 1 B. & P. 4; *Brooke v. Bryant*, 7 T. R. 25.

(b) *Brooke v. Bryant*, 7 T. R. 25, 26; *Skirrow v. Tagg*, 5 M. & Sel. 281; *Reader v. Bloom*, 10 Moore, 261, 3 Bing. 9, S. C.

(c) *Ramebottom v. Harcourt*, 4 M. & Sel. 585.

(d) *Windmill v. Cutting*, 1 Str. 191; *Byles v. Wilton*, 4 B. & Ald. 88.

(e) See *Crossley v. Shaw*, 2 W. Bl. 1088; *Hern v. Howard*, 1 Id. 231; *Unwyn v. Robinson*, Barnes, 53; *Bande v. Boddiner*, Carth. 377; *Jones v. Bodeenor*, 1 Ld. Raym. 135; *Duncombe v. Church*, 1 Salk. 1; *Bernard v. Winnington*, 1 Chit. Rep. 188.

have been sued in the Court out, of which the process issued (f). But an attorney sued separately, on a recognizance of bail, was entitled to his privilege, and to be sued accordingly (g). Such was the privilege of an attorney defendant prior to the statute of 2 W. 4, c. 39,

Now, however, this privilege of being sued by bill is abolished by the 2 W. 4, c. 39, ss. 21, 1, 3, 4, and an attorney must in all cases be sued as any other person, viz. by writ of summons, or summons and *distringas*, in non-bailable cases, or by writ of *capias* in bailable cases, and where he can be held to bail, and which proceedings have been fully noticed in the 1st Vol. of this work, Book I. Parts I. II. He may be so sued in any one of the superior Courts, although not an attorney of that Court (See 2 W. 4, c. 39, s. 1) (h).

In some instances, attornies, as defendants, are subject to the jurisdiction of courts of conscience, by the express provision of the statutes regulating such courts; as in Westminster (24 G. 2, c. 42, s. 1 (i), London (see 39 & 40 G. 3, ch. civ. s. 10), and the Tower Hamlets (19 G. 3, c. 68, s. 24), when they reside within such jurisdictions, respectively. Therefore, for debts within the cognizance of these courts, attornies residing within their jurisdiction must be sued there, and not in the superior courts. In an action against an attorney, where there is a verdict for less than 40s. damages, the Judge at *nisi prius* may, it seems, certify under the 43 Eliz. c. 6, to prevent the plaintiff from recovering his costs (k).

An attorney or officer of this Court, as we have already seen, (Vol. 1, 31, 68) cannot in general be holden to bail; but in some cases already pointed out *ante*, 631, he loses this privilege. If he be improperly arrested upon mesne process issuing out of this Court, the Court, in term, upon motion, or perhaps a Judge at chambers, in vacation, will discharge him, upon entering a common appearance; but, if he be an attorney or officer of another Court, his only remedy is by suing out a writ of privilege, and pleading it in abatement. (Vol. 1, p. 69) (l). The application for the discharge should be made without delay, otherwise the Court or a Judge may refuse it (m). As to the mode of suing out a writ of privilege, and obtaining a supersedeas thereon, where the arrest is under process from an inferior court, see Vol. 1, p. 69.

An appearance is entered, &c. as in ordinary cases, Vol. 1, p. 454.

The time for declaring and mode of declaring is the same as in ordinary cases. (See Vol. 1, 183, 188). An attorney or officer, when a

(f) *How v. Bridgewater*, Barnes, 117; and see *Morris v. Rees*, 3 Wils. 348, 2 Bla. Rep. 836, S. C.

(g) *Harper v. Tahourdin*, 6 M. & S. 383.

(h) Before this act, in all cases where an attorney was not expressly made subject to the jurisdiction of a court of conscience, he must have been sued in the court of which he was an officer, and not elsewhere, however trifling the cause of action might be. See *Wilt-*

*shire v. Lloyd*, 1 Doug. 381; *Gardner v. Jessop*, 2 Wils. 42.

(i) See *Wiltshire v. Lloyd*, 1 Doug. 381.

(k) *Wright v. Nuttall*, 10 B. & C. 492.

(l) See *Hopkins v. Squibb*, 1 Ld. Raym. 702; *Thomas v. Lloyd*, Id. 336, 1 Salk. 194, S. C.; *Dillon v. Harper*, Id. 328, 2 Salk. 545, 2 Ld. Raym. 898, S. C.; *Barber v. Palmer*, 6 T. R. 524.

(m) *Bernard v. Winnington*, 1 Chit. Rep. 188; *Paul v. Garry*, 6 B. & C. 77 b.

defendant, has not the privilege of changing the venue to Westminster, when laid in any other county (*n*), unless upon the usual affidavit, as in ordinary cases. (*See Bk. 4, Pt. 1, Ch. 6*) (*o*).

Formerly, when the proceedings were by bill, if the copy of the bill were delivered on or before the last day of the term, the defendant must have pleaded within the four days, whatever might be the distance of his residence from London (*p*), or wherever the venue was laid (*q*); but, if the copy was not delivered within that time, the defendant might plead at any time within the four first days of the following term; (*R. E. 5 A. r. 3, a*); and the notice must have been indorsed on the copy of the bill, accordingly. In accordance with this practice, it should seem, that, notwithstanding the new mode of proceeding against an attorney introduced by the 2 *W. 4, c. 39*, he must plead to the declaration within four days, *whatever may be his distance from London, or wherever the venue is laid.* (*See Vol. 1, p. 194.*)

All the remaining proceedings in the action are the same as in ordinary cases.

### SECT. 3.

#### *Action against the Marshal for an Escape, &c.*

The marshal of the King's Bench Prison, being an officer of this Court, cannot, in general, be holden to bail (*r*). The mode of proceeding, where he is improperly arrested as a common person, will be nearly the same as that pointed out, *ante*, 632, as to attornies.

The process for the commencement of any personal action against the marshal, is now, since the 2 *W. 4, c. 39, s. 21, 1, 3*, the same as against any other person, viz. by summons, or summons and *distingas*, and as fully noticed, *ante*, *Vol. 1, Book 1, Part 2*.

Serve the copy of the process on the marshal personally, or by leaving it for him with the turnkey or porter of the prison. If the escape be voluntary, (that is, if it be with the consent, privity, or knowledge of the marshal (*s*)), the writ may be issued at any time; but if it be negligent only, then it must be issued during the escape and before the party is retaken or returned into the marshal's custody, for the marshal may plead such retaking or return (*t*). You should always, therefore, when issuing the writ, have witnesses who can speak to its being issued whilst the party is out of custody.

The time for declaring and mode of declaring is the same as in ordinary cases, see *ante*, *Vol. 1, p. 183, 188*. The venue is transitory.

(*n*) *Yeardley v. Roe*, 3 T. R. 573; *Pope v. Redfearne*, 4 Bur. 207; *Pye v. Leigh*, 2 Bla. Rep. 1065.

(*o*) *See Wigley v. Morgan*, 2 Str. 1049.

(*p*) *Mann v. Fletcher*, 5 T. R. 369; *Pasmore v. Goodwin*, 2 Salk. 517.

(*q*) *Id.*

(*r*) Bro. Ab. *Bille*, p. 29; 1 Doug. 213.

(*s*) *Bonafous v. Walker*, 2 T. R. 131.

An escape from the rules, without the marshal's knowledge, is not a voluntary escape.

(*t*) *Id.*

An amendment of the declaration may in general be allowed as in other cases (u). The marshal is entitled to a particular of the cause of action for which the plaintiff sues (x).

The time, &c. for pleading is the same as in ordinary cases, and if the defendant do not plead within the limited time, sign judgment and proceed to execute a writ of inquiry, unless the action be in debt for an escape on final process, in which case the judgment is final. But if he plead, make up the issue and proceed in the action as in ordinary cases. The defendant cannot, under *nil debet*, give in evidence a retaking of the prisoner on fresh pursuit, before the commencement of the action; for, by stat. 8 & 9 W. 3, c. 27, s. 6, no retaking on fresh pursuit shall be given in evidence on the trial of any issue in an action of escape, unless the same be specially pleaded; nor shall any special plea be allowed without an oath by the defendant that the prisoner escaped without his consent, privity, or knowledge (y).

In this action against the marshal for an escape, the Court will compel him or his officer to permit the plaintiff's attorney to inspect the writ of *habeas corpus* and return, and the *committitur* indorsed thereon (z).

By stat. 8 & 9 W. 3, c. 27, s. 8, if the marshal of the King's Bench, or warden of the Fleet, or their respective deputy or deputies, or other keeper or keepers of any other prison or prisons, shall, after one day's notice in writing given for that purpose, refuse to shew any prisoner committed in execution, to the creditor at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged an escape in law. And, by section 9, if any person or persons, desiring to charge any person with any action or execution, shall desire to be informed by the said marshal or warden, or their respective deputy or deputies, or by any other keeper of any other prison, whether such person be a prisoner in his custody or not, the said marshal or warden, or such other keeper of any other prison, shall give a true note in writing thereof to the person so requesting the same, or to his lawful attorney, upon demand at his office for that purpose, or in default thereof shall forfeit the sum of 50*l.*, and if such marshal, &c. shall give a note in writing that such person is an actual prisoner in his or their custody, every such note shall be accepted, and taken as a sufficient evidence that such person was at that time a prisoner in actual custody.

Where a defendant escapes from the custody of the marshal, the latter, if served with the common side bar rule to bring the defendant into Court, &c., must give notice of the escape to the plaintiff's attorney within the time limited by the rule (a).

The execution may be as in ordinary cases.

(u) *Brazier v. Jones*, 6 B. & C. 196; *Barnes v. Eyles*, 2 Moore, 561, 8 Taunt. 512, S. C.

(x) *Webster v. Jones*, 7 D. & R. 774; and see *post*, Book 4, Part 1, chap. 15, "Particulars of Demand."

(y) See 1 Saund. 35 n. See forms of pleas and affidavit, 3 Chit. Pl. 957, &c.

(z) *For v. Jones*, 7 B. & C. 732, 1 M. & R. 570, S. C.

(a) *White v. Stratton*, 1 Dowl. P. C. 550.

## CHAPTER IV.

## PROCEEDINGS BY AND AGAINST PRISONERS.

- SECT. 1. *Against Prisoners in Custody of the Marshal*, 635 to 644.  
 2. *Against Prisoners in Custody of the Sheriff*, 644.  
 3. *By Prisoners*, 646 to 660.  
     1. *Discharge by Supersedeas*, 649.  
     2. *Discharge by Insolvent Acts*, 653.  
     3. *Discharge by other means*, 659.

## SECT. 1.

*Proceedings against Prisoners in the Custody of the Marshal.*

*Process in bailable actions against a prisoner at the suit of the same plaintiff for a different cause of action, or at the suit of another plaintiff.]* Formerly, in all cases, where the defendant was in the actual custody of the marshal, the process of detainer was by filing a bill against him with the clerk of the declarations, and serving him with a copy of it, either personally, or by delivering it to the turnkey of the prison (a). You also had to take the affidavit of debt, together with a copy of the bill, to the clerk of the rules, who filed the

(a) Even if a person having privilege of parliament were in custody in the King's Bench prison, it was not necessary to proceed against him by original, or by original bill and summons, but he might have been proceeded against by bill, as above mentioned. (*Jackson v. Mackreth*, 5 T. R. 361, ante, 618). Or, if an attorney were in custody, a detainer might have been lodged against him, in the same manner as against an unprivileged person; for his privilege in this respect was suspended whilst he was in custody. (*Byles v. Winton*, 4 B. & Ald. 88, ante, 631). And in this way, also, might a creditor proceed against his debtor who happened to be within the walls of the prison, although not there by compulsion. (*Wilson v. Jacques*, 3 T. R. 392; and see *Quin v. Reynolds*, 3 M. & Sel. 144). If the action, however, had been commenced by original, before the defendant came into the custody of the marshal, the plaintiff might still proceed against him in the ordinary way, by delivering a declaration by original, without being under the necessity of filing a bill, as in other cases. (*Nowell v. Bingham*, 4 East, 17, (c)). And, in one instance, instead of filing a bill, the plaintiff sued out a special original, returnable in this Court, and had the defendant, upon his being brought up by *habeas*, charged with this original, and thereupon re-committed to the custody of the marshal. (*Selig v. Leiderdorf*, 3 B. & Ald. 601).



affidavit, and indorsed on the copy of the bill the amount of the debt stated in the affidavit. (*R. E. 15 G. 2, r. 3*) (b).

Now, however, by the 2 *W. 4, c. 39, s. 8*, it is enacted, "That, when it shall be intended to detain in any such [personal] action, any person being in the custody of the marshal of the Marshalsea of the Court of King's Bench, or of the warden of the Fleet prison, the process of detainer shall be according to the form of the writ of detainer contained in the schedule of the act; and a copy of such process, and of all indorsements thereon, shall be delivered together with such process to the said marshal or warden to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; and such process may issue from either of the said Courts, and the declaration thereupon shall and may allege the prisoner to be in the custody of the said marshal or warden, as the fact may be, and the proceedings shall be as against prisoners in the custody of the sheriff, unless otherwise ordered by some rule to be made by the Judges of the said Courts." This statute, therefore, wholly abolishes the old process of detainer against a prisoner.

An affidavit of the cause of action must be made and filed with the signer of the writs, as in other bailable cases. (*See Vol. 1, 82 to 95*). In cases of render, this affidavit will of course have been previously made, in order to warrant the arrest.

The form of this writ of detainer, as prescribed by this statute, is as follows:—"William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith. To the Marshal of the Marshalsea of our Court before us [or "to the Warden of our prison of the Fleet."] Greeting(c), We command you, that you detain C. D. if he shall be found in your custody at the delivery hereof to you, and him safely keep in an action on promises [or "of debt," &c. as the case may be], at the suit of A. B., until he shall be lawfully discharged from your custody. And we do further command you, that, on receipt hereof, you do warn the said C. D., by serving a copy hereof on him, that within eight days after service of such copy, inclusive of the day of such service, he do cause special bail to be put in for him in our Court of — to the said action; and that, in default of his so doing, the said A. B. may declare against him before the end of the term next after his detainer, and proceed thereon to judgment and execution. And we do further command you, the said marshal [or "warden," as the case may be], that, immediately after the service hereof, you do return this our writ, or a copy hereof, to our said Court, together with the day of the service hereof. Witness, (name of Chief Justice or Chief Baron) at Westminster, the       day of       , in the year of our reign,      ."

This writ, according to the directions given in the schedule, must

(b) *Sampson v. Warren*, Barnes, 75.

(c) The word "greeting" is not in the form prescribed by the act, but the

insertion or non-insertion of it is immaterial.

be indorsed in the same manner as the writ of *capias*, Vol. 1, 106; but it is not to contain the warning on that writ, Vol. 1, 96.

The statute imperatively requires that this form should be adopted, and any material variation from it would not only render it irregular, but in some cases absolutely void. The observations already made upon the writ of *capias*, as to the direction of it, (Vol. 1, 97); the parties' names, (*Id.* 99); the character in which the plaintiff sues or the defendant is sued, (*Id.* 101); the number of the parties, (*Id.* 102); the addition of the parties, (*Id.* 103); the cause of action, (*Id.*); the return, (*Id.* 104); the date and teste, (*Id.* 105); and on the duration of and indorsements thereon, (*Id.* 106), will for the most part be here applicable. As to the mode of and time for taking advantage of any defect in the writ, see Vol. 1, p. 110.

In order to sue out the writ of detainer, prepare your affidavit of debt as in ordinary cases, and a *præcipe* for the office (c); also get a blank writ of detainer (which may be had at the stationer's, or elsewhere), and fill up the blanks in it. Take them to the signer of the writs, who will sign the writ; and the affidavit (if not already sworn before a Judge or commissioner of the Court) may be sworn before him at the same time: pay him 2s. 6d. for signing (*R. M. 3 W. 4, r. 2*), and 1s. for the affidavit, if sworn before him. Leave the affidavit and *præcipe* with him. Take the writ to the seal office, and get it sealed; pay 7d. (*R. M. 3 W. 4, r. 2*). Take care that it is indorsed with the indorsements, as directed *ante*, Vol. 1, 106 to 108. Make a copy of it, including these indorsements. The writ of detainer, and the copy of it, should then be taken to the marshal or the warden, according to which of those officer's custody the defendant is in. The writ may be sued out of either of the Courts without reference to the prison in which the defendant may be lodged. (See *2 W. 4, c. 39, s. 8*).

The mode of executing the writ is pointed out by the statute, *ante*, 636, namely, the marshal or warden, immediately after his receipt of the writ and copy, will serve such copy on the defendant personally, or leave it at his room, lodging, or other place of abode. As to the consequences of not delivering such copy, see Vol. 1, 121.

Immediately after the execution of the writ, the marshal or warden who has executed it must, as is required by the writ, return it, or a copy of it, together with the day of the service (d). If he does not so return it, he would, it seems, be subject to an attachment.

It is to be observed, that if the defendant be in custody on a criminal account, leave of the Court, or of a Judge in vacation, must first be obtained, before he can be charged with a civil action (e), (which rule includes prisoners for contempts (f), but not persons in custody under attachments for the nonpayment of costs (g), or the

(c) See the form, Chit. Forms, 589.

(d) See the form, Chit. Forms, 590.

(e) *Crackall v. Thomson*, 1 Salk. 354;  
*Ramsden v. Mackdonald*, 1 Wils. 217,  
1 W. Bl. 30, *nom. Ramsay v. M'Donald*,

VOL. II.

S. C.; *Coppin v. Gurnel*, 2 Ld. Raym. 1572, 2 Str. 873, S. C.

(f) *Prac. Reg.* 325.

(g) *Bonafous v. Schoole*, 4 T. R. 316.

## 638 *Actions against Prisoners in Custody of Marshal.*

like); and such leave is usually given, if it be not inconsistent with the terms of a conditional pardon already granted to the prisoner (h), or the like, and particularly where the party is in prison for safe custody only, and not for punishment. It may be as well also to observe, that a prisoner under criminal process in the house of correction, or other such gaols, cannot be brought up by *habeas corpus* for the purpose of being charged in the custody of the marshal upon a bailable writ, and recommitted to his former custody so charged (i), the only mode of proceeding against him while in such custody is by issuing a writ.

*Process in nonbailable actions against a prisoner.*] The process in this case is the same as in ordinary cases, where the defendant is at large, viz. by writ of summons, which should be served on him. (See Vol. 1, 441, &c.) (j).

*Bail.*] As to the mode of putting in and justifying special bail, see Vol. 1, 179, 180.

*Declaration, &c.*] Care must be taken to declare against the defendant in due time after the execution of the writ. Such time, and the consequences of not declaring within it, are pointed out by the *R. T. 3 W. 4 (k)*, which orders "that in all cases in which a defendant shall have been, or shall be, detained in prison on any writ of *capias* or detainer, under the statute 2 *W. 4, c. 39*, or, being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been, or shall be, rendered to prison before declaration on any such process, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render and notice thereof, otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the aforesaid statute, 2 *W. 4, c. 39, sched. No. 2 (l)*; unless further time to declare shall have been given to such plaintiff by rule of Court or order of a Judge." But if at any time pending the action, or before the defendant is charged in execution, there be a treaty or agreement for a settlement or compromise of the matters in dispute, no laches shall be imputed to the plaintiff, nor shall the defendant be entitled to his discharge for want of prosecution pending such treaty, &c. (m); provided such treaty or agreement be in writing, signed by the defendant or his attorney, or some other person duly authorized by him, and it be therein expressed, that proceedings are stayed at the defendant's request. (*R. H. 26 G. 3*). If the defendant escape, and

(h) *Fost. 61; Foxworthy's case, 2 Ld. Raym. 848, 7 Mod. 153, 2 Salk. 500, S. C.*

(i) *Guthrie v. Ford, 4 D. & R. 271; Brandon v. Davies, 9 East, 154.*

(j) See *Robertson v. Douglas, 1 T. R. 191.*

(k) See the 2 *W. 4, c. 39, s. 4*, and the former rules, *R. H. 26 G. 3, T. 2 G. 1, and (a)*.

(l) See the form, *Chit. Forms, 342.*  
(m) 3 *Wils. 456; 2 W. Bl. 918; 4 Bur. 2063.*

be retaken, it seems the retaking will be deemed a render within the meaning of the above rule, and the plaintiff has until the end of the term next after it to declare (n). But if the defendant have been removed by *habeas* from the custody of the sheriff, and committed to the custody of the marshal, the plaintiff in that case must declare within the same time as if the defendant still continued in the sheriff's custody, namely, before the end of the term next after the original arrest or detainer. (*R. H. 26 G. 3. See the next section*). So, if the defendant be removed from the Fleet by *habeas*, it is deemed but a continuance of the same imprisonment, and the time limited for declaring is reckoned from the original commitment, &c. (o). Lastly, where the defendant is in custody upon joint process against him and another, and the other has not been arrested; as the plaintiff cannot declare until the other defendant have been brought in or outlawed, he may obtain time accordingly for that purpose upon application to the Court, or to a Judge at chambers, upon shewing that he is using due diligence in proceeding to compel the appearance of, or to outlaw the defendant, who is at large; (*Vol. 1, p. 187*) (p); but in no other case will the Court grant a further time to declare where the defendant is in custody.

Where the defendant is in custody on a *criminal* account, he cannot be charged with a declaration without leave of the Court or a Judge; and, until that leave is obtained, it seems he would not be entitled to be discharged for not declaring against him in due time (q).

It is to be here noticed, that, by the rule of *H. T. 2 W. 4, s. 87*, "if by reason of any writ of error, special order of the Court, agreement of the parties, or other special matter, any person detained in the actual custody of the marshal of the King's Bench prison, or warden of the Fleet, be not entitled to a *supersedeas* or discharge, to which such prisoner would, according to the general rules and practice of the Court be otherwise entitled, for want of declaring, proceeding to trial or judgment, or charging in execution within the times prescribed by such general rules and practice, then, and in every such case, the plaintiff at whose suit such prisoner shall be so detained in custody, must, with all convenient speed, give notice in writing (r) of such writ of error, special order, agreement, or other special matter, to the marshal or warden, upon pain of losing the right to detain such prisoner in custody by reason of such special matter. And the marshal or warden must forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison; and must also present to the Judges of the respective Courts from time to time, a list of the prisoners to whom such special matter shall relate, shewing such special matter, together with a list of

(n) See *Malson v. Butler*, Barnes, 382; and see *R. T. 6 A.*; *Grimes v. Joseph*, 2 B. & B. 35, 4 Moore, 380, S. C.

(o) *Rose v. Green*, 1 Bur. 439; *Tidd*,

(p) *Morton v. Grey*, 9 B. & C. 544; Barnes, 401, 396; 2 Sellon, 30; *Knight v. Parker*, 2 W. Bl. 759.

(q) *Altroffe v. Lunn*, 9 B. & C. 395.

(r) See form, Chit. Forms, 590.

the prisoners supersedeable (s): The object of requiring this notice to the marshal or warden is, that he may be better enabled to prepare the lists required by the rules, *post*, 651.

If the defendant be discharged out of custody for not declaring within the limited time, or by having put in and justified bail, or for any other cause, the proceedings in the action, subsequently to the discharge, are no longer governed by the rules laid down in this or the next section, but are the same as in ordinary cases where the defendant is at large.

*Engross a copy of your declaration on plain paper. Indorse on it the notice to plead, as directed Vol. 1, 193, as when you declare absolutely. You may also indorse on it the usual demand of plea; and as to which, see Id. 197, 198. Annex a particular of demand to the declaration, as in other cases, (Vol. 1, p. 192).* The declaring absolutely or demanding a plea in an action against a prisoner will not, as in cases where the defendant is at large, waive the plaintiff's right to a justification of bail. As to the form of declaring generally, see Vol. 1, 188. The declaration should allege the defendant to be in the custody of the marshal or warden, as the fact may be; and this, although the process under which the defendant is detained issued out of a different court. (2 W. 4, c. 39, s. 8; R. M. 3 W. 4, r. 15) (t). *Deliver a copy of the declaration to the defendant's attorney, if he defends by one, or to the defendant himself, or the turnkey of the prison, if he does not defend by attorney. (See Vol. 1, p. 191) (u).* When a defendant renders in discharge of his bail, after a declaration has been filed conditionally, and notice served upon him, and rule

(s) See the former rule in K. B., M. T. 1816, 5 M. & Sel. 522.

(t) See the form, Chit. Forms, 95.

(u) The above is, it seems, the present mode of declaring against a prisoner, whether in custody of the marshal, warden, or sheriff. When the proceedings by bill were in existence, and the defendant was in custody of the sheriff, upon a bill of Middlesex, *latitat*, or the like, out of this Court, the mode of declaring was to engross a bill on plain parchment, and to make two copies of it on plain paper. (R. H. 2 W. 4, r. 36). *You filed the bill with the clerk of the declarations, and delivered one of the copies (with a notice to plead indorsed on it) to the defendant, or to the gaoler or keeper of the gaol or prison in which he was confined, (4 & 5 W. & M. c. 21, 1 T. R. 191), who must have forthwith delivered the same to his prisoner under pain of an attachment. (R. E. 5 W. & M. r. 3, s. 7). You paid him 1s. You then made an affidavit of the delivery, and annexed the remaining copy of the bill to such affidavit, and took them to the clerk of the rules, who filed the affidavit and copy of the bill annexed to it,*

*and gave you back an office copy of the affidavit, with a rule to appear and plead indorsed thereon. (R. H. 2 W. 4, r. 36). You paid him 2s. 6d.* This mode of proceeding, however, was to be adopted only in cases where the defendant was in the custody of the sheriff, upon a bill of Middlesex, *latitat*, or the like; for, if you proceeded against him by original and *capias*, you delivered your declaration, and proceeded as in ordinary cases, without being obliged to file a bill against him, as above mentioned. 2 Sellon, 27. The proceeding by bill of Middlesex, *latitat*, and the like, being abolished by the 2 W. 4, c. 39, it is conceived that the declaration is now, as it was formerly in proceeding by original and *capias*, delivered as in ordinary cases, and as above directed in the text. The 2 W. 4, c. 39, s. 8, directs that the proceedings against prisoners detained under a writ of detainer in the custody of the marshal or warden, shall be as against prisoners in the custody of the sheriff. *Sed vide* Mr. Chapman's Practice, Second Addenda, from which it should seem that the old mode of declaring should be s

to plead given, it is not necessary to deliver another declaration for the defendant in custody (v).

It may be necessary here generally to premise, that when the defendant is in custody, all papers, notices, &c. which do not ordinarily require personal service, may be delivered for him to the turnkey of the prison (x).

If the defendant be a prisoner in the custody of the warden on process issuing out of this Court, or in the custody of the marshal on process issuing out of the Common Pleas, then, previous to the 2 W. 4, c. 39, s. 8, it was necessary to bring him up by *habeas corpus*, in order to charge him with a declaration (y); but where he was in the custody of the sheriff, it was not necessary to do so. (*Post*, 644). Now, therefore, as that act provides that proceedings against prisoners in the custody of the marshal or warden shall be as against prisoners in the custody of the sheriff, it is no longer requisite to bring up a prisoner in the custody of the marshal or warden by *habeas corpus*, in order to charge him with a declaration (z).

*Plea, &c.*] An important change in the former practice, as regards the defendant's pleading, is effected by the late rule of T. T. 3 W. 4, which orders "that in all actions against prisoners in the custody of the marshal or warden, or of the sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules as in actions against defendants who are not in custody." And see the practice, Vol. 1, 193 to 211.

*Trial, &c.*] After the delivery of the copy of the declaration, as above mentioned, the plaintiff must proceed to trial, or, in case of judgment by default, demurrer, or issue upon *nul tiel record*, to final judgment, within three terms inclusive after the delivery of the copy of the declaration, if by the course of the Court he can do so; (*R. H. 2 W. 4, r. 85; R. H. 26 G. 3; T. 2 G. 1*); or if the defendant after declaration be rendered in discharge of his bail, then within three terms after such render and notice thereof given, the term of the notice and render being deemed one; otherwise the defendant shall be discharged by *supersedeas*. (*R. H. 26 G. 3; T. 2 G. 1*) (a). It should seem, that, if the copy of the declaration be delivered in vacation, the preceding term will be reckoned as one of the three; but this may be questionable, and has not yet been decided (b). Where two prisoners were sued jointly, and one of them pleaded to issue, and the other allowed judgment to go by default, and the jury who tried the issue against the one assessed the damages against the other; the Court held it sufficient that the plaintiff had proceeded to trial against the one who pleaded

(v) *Thompson v. Carey*, 1 Chit. Rep. 720.

(x) *Whitehead v. Barber*, 1 Str. 248. See *Dent v. Hallifax*, 1 Taunt. 493; *Gehegan v. Harper*, 1 H. Bl. 251.

See *Sherston v. Hughes*, 5 T. R.

35; *Filkes v. Allen*, 2 Stra. 1153.

(z) *Barnett v. Harris*, per Taunton, J. K. B. 12 June, 1833, 6 Leg. Ob. 236.

(a) See 4 T. R. 664.

(b) See *Heaton v. Whittaker*, 4 East. 349.

to issue within the three terms, although he had not proceeded to final judgment against the other within that time (c). So, where a prisoner, after being charged with a declaration in Trinity term, 1819, absconded in the long vacation, and did not return into custody until Hilary term, 1820, the Court of Common Pleas refused to discharge him, although the plaintiff had not proceeded to judgment against him within Hilary term: the Court saying that the object of the practice as to *supersedeas* is, to prevent defendants from being imprisoned longer than is necessary to enable the plaintiff to proceed in the action; and here the defendant could not complain of the laches of the plaintiff whilst he was not actually in custody (d). We have seen, *ante*, 638, that an agreement in writing, &c. for a settlement or compromise of the matters in dispute may bar the defendant's right to a *supersedeas*.

The issue, notice of trial or inquiry, may be delivered to the turnkey for the defendant (e).

*Execution.*] After such trial or final judgment, as above mentioned, or after a render in discharge of bail subsequent to such trial or judgment, the plaintiff must charge the defendant in execution within two terms after such trial, judgment, or render, and notice thereof given, respectively, of which two terms the term of the trial, judgment, or render, shall be deemed one (f), unless a writ of error be pending, or an injunction obtained, and then within two terms including the writ of error shall be determined or the injunction dissolved: otherwise the defendant shall be discharged by *supersedeas* (g). If the cause be tried at any of the sittings in term, the plaintiff has only the following term to charge the defendant in execution; but if in vacation or at the assizes, he has the two following terms allowed him for that purpose (h). So, if the defendant be rendered after verdict or judgment in term, the plaintiff has but the following term to charge him in execution. Still, however, if there be a verdict in vacation, and a render in the same vacation, the time for charging the defendant in execution shall be computed, not from the time to which the render has relation, but from the time of the verdict; so that the plaintiff, in such a case, has two whole terms after the verdict to charge the defendant in execution (i). Where one of two defendants brought a writ of error in the Exchequer Chamber, it was ruled that the plaintiff could not charge the other in execution, until the transcript was remitted to this Court (j). So, where a prisoner, after a *habeas corpus* sued out in order to bring him

(c) *Wriglesworth v. Wright*, 13 East, 167.

(d) *Grimes v. Joseph*, 2 B. & B. 35; 4 Moore, 380, S. C.

(e) *Whitehead v. Barber*, 1 Str. 248; *ante*, 641.

(f) R. H. 2 W. 4, r. 85; R. H. 26 G. 3; R. T. 2 G. 1; R. T. 9 W. 3.

(g) See *Russell v. Stewart*, 3 Bur. 1787; *Garratt v. Mantell*, 2 Wils. 380;

*Heaton v. Whittaker*, 4 East, 350; *Laidler v. Elliott*, 5 D. & R. 635, 3 B. & C. 738, S. C.; Tidd, 9th ed. 360.

(h) See *Heaton v. Whittaker*, 4 East, 349; *Brown v. Gardner*, 1 Dowl. P. C. 426.

(i) *Smith v. Jefferys*, 6 T. R. 776.

(j) *Laroche v. Washbrough*, 2 T. R. 737; *ante*, Vol. 1, p. 357.

up from the Fleet prison, for the purpose of charging him in execution in this Court, sued out and obtained the allowance of a writ of error, the Court held that he could not be charged in execution, but should be remanded to his former custody (*k*). A writ of error, although bail thereto do not justify, is a good cause for not charging the defendant in execution (*l*). Bringing an action on the judgment within the two terms is not equivalent to charging the defendant in execution; and consequently, although charged with such action, the defendant will be entitled to a *supersedeas* (*m*).

The mode of charging the defendant in execution, where he still remains in the custody of the marshal, is thus:—*Get a rule from the clerk of the rules, requiring the marshal to acknowledge the defendant in his custody* (*n*); *pay him 5s.; take the rule to the marshal's office, and he will write the acknowledgment on it; pay him 10s. 6d.* Next *make out a committitur piece on a plain piece of parchment* (*o*); *and file it with the clerk of the judgments; pay him 2s.* And lastly, (although not essentially necessary) (*p*), *enter the committitur in the marshal's book, which is kept in the judgment office; pay 6d.; you will see the form of the entry there.* The marshal's acknowledgment must be of the same term the defendant is charged in execution, otherwise the defendant will be entitled to a *supersedeas* (*q*). If the *committitur* be erroneous, the plaintiff must give the defendant notice of his having abandoned it, before he can enter a second, rectifying the mistake (*r*). Formerly, in order to charge the defendant in execution, it was necessary to enter the proceedings of record, but this, by the late rule of *H. T. 2 W. 4, r. 95*, is no longer requisite (*s*). Formerly, also, the *committitur* piece must have been filed with the clerk of the judgments on or before the last day of the term in which the prisoner was to be charged in execution; and the clerk of the judgments must have entered the *committitur* on the roll within four days after the end of the same term (Sunday being reckoned, unless it were the last of the four): otherwise the defendant was entitled to his discharge; but this, by the above rule, is no longer requisite (*t*).

If a prisoner in custody of the marshal, after being charged with the declaration in this Court, be removed to the Fleet, the plaintiff must proceed against him in this Court to final judgment, and then have him brought up by *habeas corpus ad satisfaciendum*,

(*k*) *Stonehouse v. Ramsden*, 1 B. & Ald. 676. See *Fisher v. M'Namara*, 1 B. & P. 292, *cont.*

(*l*) *Maitland v. Mazeredo*, 6 M. & Sel. 139.

(*m*) *Childs v. Prowse*, Willes, 531, Barnes, 390, S. C.; *Maud v. Branthwaite*, 2 Str. 943; *Pierson v. Goodwin*, 1 B. & P. 361.

(*n*) See the form, Chit. Forms, 591.

(*o*) See the form, Chit. Forms, 591.

(*p*) M.S. East. 1819.

(*q*) *Fisher v. Stanhope*, 1 T. R. 464.

(*r*) *Topping v. Ryan*, 1 T. R. 227.

(*s*) Mr. Chapman, in his second Ad-

denda of Practice, intimates that it is still necessary afterwards to make an entry of the final judgment, although it is not necessary to make it at the time the prisoner is charged in execution.

(*t*) See *Gootman v. Anon.* 1 Dowl. P. C. 128; R. E. 41 G. 3, r. 2; *Purdum v. Brokbridge*, 3 D. & R. 507, 2 B. & C. 342, S. C.; and see *Cunningham v. Cogan*, 10 East, 46; *Pearson v. Rawlings*, 1 East, 405; 2 Str. 1226. See the form of the entry of the *committitur* on the roll, Chit. Forms, 591.



## 644 *Actions against Prisoners in Custody of Marshal.*

in order to charge him in execution (*R. T. 2 G. 1, b*) within the time above limited for that purpose (*u*). Though a judgment is against several, this *habeas* ought only to be issued against those who are in custody (*x*). *Sue out the habeas, as directed post, Bk. 4, Pt. 1, Ch. 3; and leave it with the clerk of the papers at the Fleet prison (y); pay him 9s. 2d. Then, upon the return day of the habeas, attend in Court, and the defendant will be brought up, charged in execution, and committed to the custody of the marshal (z).* If, instead of proceeding thus, the plaintiff were to proceed to execution as if the defendant were still in custody of the marshal, such proceeding would be void, and the defendant would be entitled to his discharge by *supersedeas* (*a*).

The Court will not, it seems, grant a *habeas corpus* to bring up a prisoner in custody on a criminal account, in order to have him charged in execution in a civil action (*b*).

As to warrants of attorney by prisoners, *see ante, p. 493.*

### SECT. 2.

#### *Proceedings against Prisoners in Custody of the Sheriff.*

If a defendant be in custody of the sheriff, (that is, if he be in custody of the officer who arrested him, or of any other officer of the sheriff, or if confined in the county gaol), upon process issuing from this Court, the plaintiff may declare against him as being in such custody; (*4 & 5 W. & M. c. 21*); or he may remove him into the custody of the marshal by a *habeas corpus cum causa*, and proceed against him as directed in the last section, and which was the only way of proceeding previously to the above statute. This latter mode, however, is never adopted by the plaintiff, on account of the additional expense; but it is the constant practice of defendants to have themselves so removed, at their own expense, as will be mentioned in a subsequent part of this work. (*See post, Bk. 4, Pt. 1, Ch. 3.*)

It is necessary to premise, that this section relates merely to proceedings in bailable actions; in nonbailable actions, you may serve the defendant with process, enter an appearance for him, deliver your declaration, and proceed in the ordinary way, as if he were at large (*c*).

The defendant may put in and justify bail at any time before final

(*u*) *See ante, 642; Stonehouse v Ramsden*, 1 B. & Ald. 676; *Morris v. Magrath*, 3 B. & B. 301, 7 Moore, 154, S. C.

(*x*) *Wilson v. Bacon*, 1 Dowl. P. C. 118.

(*y*) *See Park v. Torre*, 3 B. & B. 93, 6 Moore, 260, S. C.

(*z*) *See Rex v. Sheriff of Middlesex*, 1 Chit. Rep. 359; *Goodman v. Anon.* 1

Dowl. P. C. 120.

(*a*) *Filkes v. Allen*, 2 Str. 1153

(*b*) *See Guthrie v. Ford*, 4 D. & R. 271; *Brandon v. Davies*, 9 East, 157; *Freeman v. Weston*, 8 Moore, 81, 1 Bingh. 221, S. C.

(*c*) *Robertson v. Douglas*, 1 T. R. 192; and *see Vol. 1, p. 440, &c.*

judgment, and be discharged; in which case the subsequent proceedings in the action must be the same as in ordinary cases. (*Vol. 1, 183*).

*Process.*] If the action be at the suit of the same plaintiff on whose account the defendant was arrested, but for a different cause of action, or if at the suit of a different plaintiff, the first step to be taken is to sue out a bailable writ of *capias* against the defendant, as in ordinary cases, and lodge it in the sheriff's office. *Pay 2s. 6d.* If the defendant be in custody on a criminal account, it will be necessary to obtain the leave of the Court, or of a Judge in vacation, before you sue out process against him. (*Ante, p. 637*).

*Bail.*] As to the putting in and justifying bail, see *Vol. 1, 179*.

*Declaration, &c.*] Care must be taken to declare against the defendant in due time after the execution of the writ, otherwise he will be entitled to be discharged out of custody. As to such time for declaring, &c., see *ante, 638*.

The practical directions, *ante, 640*, as to the mode of declaring against a prisoner in the custody of the marshal or warden, will be here applicable, *mutatis mutandis*. The copy of the declaration should be delivered to the defendant's attorney if he defend by one, or if not, to the defendant himself, or to the gaoler or keeper of the gaol or prison in which he is confined (*d*), who must forthwith deliver the same to his prisoner under pain of an attachment; (*R. E. 5 W. & M. r. 3, s. 7*); *pay him, 1s.* The declaration should allege the defendant to be in the custody of the sheriff (*e*).

*Plea, &c.*] The practice as to the time for, and terms of, the defendant's pleading will be found *ante, 641*.

*Trial, &c.*] The plaintiff must proceed to trial or (in case of judgment by default, demurrer, or issue upon *nul tiel record*) final judgment within three terms inclusive after the delivery of the declaration, (*R. H. 2 W. 4, r. 85*; *R. II. 26 Geo. 3*), in the same manner as in actions against prisoners in the custody of the marshal. (*See ante, 641*).

The other proceedings to judgment inclusive are the same as in ordinary cases.

*Execution.*] The plaintiff must charge the defendant in execution within two terms after the trial or final judgment above mentioned, (the term of the trial or final judgment being deemed one), (*R. H. 2 W. 4, r. 85*), in the same manner as in actions against prisoners in the custody of the marshal. (*See ante, p. 642*).

The mode of charging the defendant in execution is thus:—*Sus*

(*d*) See 4 & 5 W. & M. c. 21; 1 T. R. 191. (*e*) See R. M. 3 W. 4, r. 15; 4 & 5 W. & M. c. 21.

out a *ca. sa.*, as directed Vol. 1, p. 410; take it to the sheriff's office, and obtain a warrant on it; pay 2s. 6d.; and lastly, lodge the warrant with the gaoler of the prison in which the defendant is detained (f). The charging in execution is then complete.

As to the mode of removing prisoners from one custody to another by writ of *habeas corpus*, see post, Bk. 4, Pt. 1, Ch. 3.

### SECT. 3.

#### Proceedings, &c. by Prisoners.

It may perhaps be necessary to premise, that, in the prison of the King's Bench, which is more immediately the prison of this Court, prisoners charged with civil actions merely (g), may have the benefit of the rules of the prison, upon entering into a bond with two sufficient sureties, as a security to the marshal against escape, and upon paying the marshal a certain per-centage upon the amount of the debts for which they are detained. (See R. H. 2 & 3 G. 4, r. 2) (h). These rules are certain limits beyond the walls of the prison, within which prisoners, who have found sureties, &c. as above mentioned, may have leave to reside. They extend "from Great Cumber Court, in the parish of St. George the Martyr, in the county of Surry, along the north side of Great Suffolk Street, as far as the Star Brewhouse; and from thence along the north-west side of Gilbert's Lane to the Blackfriars Road, and across the said road along the north-west side of Webber Street, to the Half-way House; and from thence along the western side of Barron's Buildings and St. George's Row, to the Westminster Road; and then across the said road, and along the western side of St. George's Mall, and from the pastry cook's at the west end thereof, directly across to the lamp-post on the foot-path near the watch-house facing the Dog and Duck, and along the said foot-path from the said lamp-post, to another lamp-post on the eastern side of the said road facing Hay's Nursery; and then along the whole of the said road leading by Prospect Place to the Elephant and Castle; and from thence along the eastern side of Newington Causeway to Great Cumber Court aforesaid. (R. E. 35 G. 3). The following places, however, within the above limits, are excepted; namely, "all taverns, victualling houses, alehouses, wine vaults, houses or places licensed to sell gin or other spirituous liquors, and all places licensed for public entertainments." (Id.) By a subsequent rule, R. T. 36 G. 3, the parish church of St. George the Mar-

(f) See *Poole v. Cook*, Barnes, 389; *Owen v. Owen*, 2 B. & Adol. 805, 1 Dowl. P. C. 335, S. C.; in which it was held that the delivery of the *ca. sa.* to the sheriff in whose custody the defendant is, is sufficient to charge him in execution. And see *Leach v. Johnson*, 1 Dowl.

P. C. 384.

(g) See *Jones's case*, 2 Str. 817; *Rex v. Buckland*, 1 Id. 413; *Hall v. Arnold*, 2 D. & R. 709; *Rex v. Bailey*, 9 B. & C. 67.

(h) 5 B. & Ald. 560.

tyr, within the borough of Southwark, and the adjoining church-yard, are to be deemed within the rules. And by the above rule, *E. 35 G. 3*, it is also ordered that the rules shall include "the house of correction for the county of *Surry*, the new gaol, *Southwark*, and the gaol then building for the county of *Surry*, and the highways (exclusive of the houses on each side thereof) leading from the King's Bench prison to the said gaols respectively." These rules are considered to all intents as the prison itself; and if the prisoner break them, that is, if he go beyond the limits above described, the marshal is answerable to the plaintiff as for an escape, in precisely the same manner as if the defendant had escaped from the prison; and the prisoner is thereby not only deprived of the privilege of residing within the rules in future (unless the Court upon application shall otherwise order), (*R. H. 57 G. 3, r. 1*), but also, it seems, from a case lately tried at the *Surry* assizes, is liable to an indictment as for a breach of prison (*i*). (*See as to escape, where the prisoner is in custody upon mesne process, Vol. 1, p. 128; and where the prisoner is in custody in execution, Vol. 1, p. 411. See as to the action against the marshal, ante, 633*).

Besides the liberty of residing within the rules, above mentioned, the prisoner may in term time have a *day rule* (that is, a permission from the Court to go beyond the rules of the prison, for the purpose of transacting his business), upon application to the marshal, and signing a petition to the Court (*j*), for that purpose (*k*), and upon paying some trifling fee to the clerk of the day rules. The petition is afterwards read in Court, and the prayer of it granted of course; but the rule (that is, a certificate of the Court's having granted the prisoner a day rule, and which serves as a protection to him from arrest, &c.) is in fact given to the prisoner in the morning, and probably before the petition is even presented; for it has been holden, that where the Court grant the prayer of the petition, it has a retrospective effect, and warrants the day rules given under it, at whatever time in the morning they may have been granted (*l*). Prisoners within the walls of the prison may also have day rules during term, upon satisfying the marshal that they will return to the prison before 9 o'clock the same evening; it being ordered by *R. H. 45 G. 3*, and *R. E. 30 G. 3*, that every prisoner having a day rule shall return within the walls or rules of the prison at or before 9 o'clock of the evening of the day for which such rule shall be granted (*m*). Formerly, a prisoner could have only three day rules in each term; (*R. E. 30 G. 3*); but at present the number is not limited. (*R. H. 45 G. 3*). It may be questionable whether the marshal would be liable for an escape of the prisoner who did not return until after 9 o'clock in the same evening, at which time the day rule expires.

Allowances are to be made out of the county rates for the subsistence of prisoners. (*See 14 Eliz. c. 5, s. 37; 43 Eliz. c. 2, s. 14, 15;*

(i) See Burn's J., title "*Escape*."

(j) See the forms, Chit. Forms, 593, 594.

(k) See *Anon.* 1 Str. 503; R.M. 28 C. 2.

(l) *Field v. Jones*, 9 East, 151. See *Daniel v. Morewood*, 2 Ld. Raym. 927, *contra*.

(m) 6 East, 2; 3 T. R. 584.

and 53 Geo. 3, c. 113). Justices may order parochial relief to prisoners for mesne process in other than county gaols. (52 G. 3, c. 160). By the 53 G. 3, c. 21, and 7 & 8 G. 4, c. 53, s. 113, the commissioners of the customs are to make allowances for the subsistence of prisoners confined under Exchequer process.

By *R. M. 7 G. 4 (n)*, not more than five prisoners are to lodge in one room in the prison, until the whole number of prisoners in the prison exceed 900.

By *R. H. 7 & 8 G. 4 (o)*, no officer or person employed in the management or superintendence of the prison or prisoner shall be concerned in selling any article to, or doing any work for any prisoner, on pain of being dismissed from his place by the marshal, who must remove him.

The rule of *T. T. 21 G. 3*, directs that the marshal of the Marshalsea of this Court shall permit no persons to enter into the prison without their being first searched, to see whether they have any spirituous liquors about them; and that he do not suffer the wives or children of any of the prisoners to lodge in the prison under any pretence whatsoever; and that the marshal do prescribe in what manner, and for how long, visitors shall be allowed to see or stay with the prisoners, according to the circumstances of every case, in his discretion. Attorneys are entitled to be admitted to the interior of the King's Bench prison, when they have occasion to go there for the benefit of clients confined in the prison, or when they are sent for by such clients. But the Court will not make a general order upon the marshal to permit an attorney to go into the interior at all times to visit his clients (*p*).

The rule of *M. T. 3 G. 2*, directs, that "the turnkeys of the said prison do diligently attend at the gate or door of the said prison, as the duty of their office requires, and do admit all such persons to have access to any of the prisoners as by law are entitled thereto."

By stat. 32 G. 2, c. 28, s. 11, all prisoners in custody of the marshal, sheriff, &c. may in *term time* petition the Court out of which the process under which they are imprisoned issued, or under whose jurisdiction the prison in which they are confined is, or in *vacation* may petition one of the Judges of such Court, or a Judge of assize, complaining of any exaction or extortion by any gaoler or other person employed in the keeping, &c. of the prison in which they are confined, or of any other abuse whatsoever committed or done by them in their respective offices; and the Court or Judge shall hear and determine the same in a summary way, and make such order for redressing the abuses complained of, and for punishing the officer, &c., and for making reparation to the parties injured, as they shall think just, together with the costs of such complaint; and such order may be enforced by attachment or otherwise, as other orders of the Court. (*See R. H. 59 G. 3*).

The remainder of this section shall be confined to the consideration of the different modes by which a prisoner may be discharged

from his imprisonment; and they shall be treated of in the following order:—

1. *Discharge by Supersedeas.*
2. *Discharge under the Insolvent Acts.*
3. *Discharge by other Means.*

1. *Discharge of a Prisoner by Supersedeas.*

*In what cases, &c.*] If a declaration be not delivered to a prisoner in due time by the plaintiff at whose suit he is in custody, the defendant may be discharged out of custody by *supersedeas*, upon entering a common appearance. (*R. T. 3 W. 4; R. H. 26 G. 3*). *As to the time limited for declaring, see ante, p. 638.* But if the defendant be in custody upon joint process against him and another, and the other have not been arrested, this, it seems, will be a sufficient cause for refusing the *supersedeas*, provided it appear that the plaintiff is using due diligence to compel the appearance of, or to outlaw the other defendant; for until the other defendant be arrested or outlawed, or has appeared, the plaintiff cannot declare against the one who is in custody. However, in such a case, the plaintiff regularly should obtain time to declare, as directed, *Vol. 1, p. 187. (See ante, p. 639).* Where the defendant is in custody on a criminal account, he cannot, as we have seen, *ante, 639*, be charged with a declaration, without leave of the Court or a Judge; and until that leave is obtained, it seems he would not be entitled to a *supersedeas* (r).

If the plaintiff do not proceed to trial, or (in case of judgment by default, demurrer, or issue upon *nul tiel record*) to final judgment, in due time, the defendant may be discharged by *supersedeas*, upon entering a common appearance. (*R. H. 2 W. 4, r. 85; R. H. 36 G. 3*). *As to the time limited for proceeding to trial, &c. see ante, 641.* But if the plaintiff's not having proceeded in due time have arisen from the default of the Court, as by the Court's deferring to give judgment on a demurrer (s); or from the default of the defendant, by his neglecting to plead in time, or the like,—or from the assizes at which the cause was to be tried not occurring within the time limited for the plaintiff's proceeding to trial (t): in these and the like cases a *supersedeas* will not be granted. Also, where two prisoners were sued jointly, and one of them pleaded to issue, and the other allowed judgment to go by default; and the jury who tried the issue against the one assessed the damages against the other: the Court held it sufficient that the plaintiff proceeded to trial within three terms against the one who pleaded to issue, although he had not proceeded to final judgment within the same time against the other who allowed judgment to go by default; and they accordingly refused to discharge the latter by *supersedeas* (u). Where a prisoner, who had been

(g) 1 East, 77; and see 1 Chit. Rep. 387.

(r) *Altruffe v. Lunn*, 9 B. & C. 395.

(s) *Barnes*, 383.

(t) *Barnes*, 383.

(u) *Wriglesworth v. Wright*, 13 East,

167.

charged with a declaration as of Trinity term, absconded during the long vacation, and did not return into custody until the following Hilary term, the Court of Common Pleas refused to discharge him, though the plaintiff had not signed judgment before the end of Hilary term (x).

If the plaintiff do not charge the defendant in execution in due time, the latter may be discharged out of custody by *supersedeas*, upon entering a common appearance. (*R. H. 2 W. 4, r. 85; R. H. 26 G. 3*). As to the time within which the defendant should be charged in execution, see *ante*, 642. But if the defendant hinder the plaintiff from proceeding, by bringing a writ of error or obtaining an injunction, he shall not be entitled to a *supersedeas*, if the plaintiff proceed in due time after the writ of error has been determined, or the injunction dissolved. *Ante*, 642. Or if one of several defendants bring a writ of error, the plaintiff is not bound to proceed against the others until the time limited after the writ of error has been determined (y). So, where the assignees of a bankrupt were prevented from charging the defendant in execution by the plea put in to their *scire facias*, the Court refused a *supersedeas* (z).

If, at any time pending the action, or before the defendant is charged in execution, there be a treaty or agreement for a settlement or compromise of the matters in dispute, no laches shall be imputed to the plaintiff, nor shall the defendant be entitled to his discharge for want of prosecution pending such treaty, &c. (a); provided such treaty or agreement be in writing, signed by the defendant or his attorney, or some other person duly authorized by him, and it be therein expressed that proceedings are stayed at the defendant's request. (*R. H. 6 G. 3*).

Also, if the prisoner have given his creditor a notice of his intention to apply for his discharge under the insolvent act, he shall not be superseded by reason of the creditor's not proceeding in the action against him, according to the rules and practice of the Court, from the time of such notice given, until some rule or order shall be made in the cause in that behalf by the Court or by one of the Judges thereof. (*R. E. 3 G. 4*) (b). By the 7 G. 4, c. 57, s. 15, a prisoner who has filed his petition to be discharged under that act, shall not, after the filing such petition, be discharged out of custody as to any action, suit, or process, for or concerning any debt, damages, or claim, with respect to which he may be discharged under that act, by virtue of any *supersedeas*, judgment of *nonpros*, or judgment as in case of a nonsuit for want of the plaintiff's proceeding therein. The prisoner having filed his petition, will be sufficient to prevent him from having the *supersedeas*, although he has not given the plaintiff a notice of such filing, &c. (c).

(x) *Grimes v. Joseph*, 2 B. & B. 35, 4 Moore, 390, S. C.

(y) 2 T. R. 737. See Vol. 1, p. 357.

(z) 2 Wils. 378.

(a) 3 Wils. 455; 2 W. Bl. 918; 4 Bur. 2063.

(b) 5 B. & Ald. 799; 1 D. & R. 472; 2

Chit. Rep. 377; 1 D. & R. 472; and see 1 Bingh. 221, 8 Moore, 81, S. C.; 4 D. & R. 216, 347; 1 Bingh. 431, 8 Moore, 529, S. C.

(c) *Molyneux v. Browne*, T. T. 1833, Exch.

We have seen, *ante*, p. 639, that if, by reason of a writ of error, order, agreement, or other special matter, the prisoner be not entitled to a *supersedeas*, which he would otherwise be entitled to for not declaring, &c. in the prescribed time, the plaintiff must give a written notice of such writ of error, &c. to the marshal or warden, otherwise the prisoner will be entitled to the *supersedeas*.

It is a general maxim, that a prisoner once supersedeable is always so, unless he has waived the right to a *supersedeas*; that is, if for instance he be supersedeable because a declaration has not been delivered to him in due time, the delivery of a declaration afterwards will not prevent him from being discharged on account of the previous default (c). There is one exception, however, to this rule, namely, that if the defendant be once charged in execution, he cannot afterwards take advantage of any preceding default of the plaintiff, provided he had an opportunity, previously to his being charged in execution, of applying for his *supersedeas* (d). It may be necessary to add, that where a defendant is supersedeable, the plaintiff cannot prevent his discharge by discontinuing the present action, and lodging a fresh detainer against him for the same cause of action; but for a different cause of action, for which the defendant can be holden to bail, perhaps he may (e). Nor can the plaintiff, after the defendant's discharge, again hold him to bail for the same cause of action (*Vol.* 1, p. 75).

*List of prisoners supersedeable, &c.]* The marshal and the warden must present to the Judges of the Courts of King's Bench, Common Pleas, and Exchequer, in their respective chambers at Westminster, within the first four days of every term, a list of all such prisoners as are supersedeable; shewing as to what actions and on what account they are so, and as to what actions (if any) they still remain not supersedeable. (*R. H. 2 W. 4, r. 86*).

We have seen, *ante*, p. 639, that, if by reason of any writ of error, order, agreement, or other special matter, the prisoner be not entitled to a *supersedeas*, which he would otherwise be entitled to for not declaring, &c. in the prescribed time, the plaintiff must give a written notice of such writ of error, &c. to the marshal or warden, otherwise the prisoner will be entitled to the *supersedeas*; and the marshal or warden must forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison, and must also present to the Judges of the respective Courts, from time to time, a list of the prisoners to whom such special matter relates, shewing such special matter, together with the list of the prisoners supersedeable. (*R. H. 2 W. 4, r. 87*)

If the prisoner has been in the custody of the marshal or warden

(c) *Peachey v. Bowes*, Barnes, 368; 7 Moore, 154, .C. Tidd, 9th ed. 357.

(d) *Rose v. Christfield*, 1 T. R. 591. 1048; but see *Gehegan v. Harper*, 1 H. See *Morris v. M'Grath*, 3 B. & B. 361, Bl. 251.

(e) See *Hutchins v. Kenrick*, 2 Bur.



for one calendar month after he is supersedeable, although not superseded, he is entitled to be forthwith discharged out of the King's Bench or Fleet prison, as to all such actions in which he is supersedeable. (*R. H. 2 W. 4, r. 88*) (*f*).

*How supersedeas obtained, &c.*] The rules *T. 3 W. 4*, and *H. 26 G. 3*, state that the defendant shall be discharged in the several cases above mentioned, by *supersedeas* or otherwise, according to the course of the Court, upon entering a common appearance, unless, upon notice given to the plaintiff's attorney, good cause be shewn to the contrary. The mode, therefore, of procuring the defendant's discharge in the several cases above mentioned is as follows:

If the defendant be in the custody of the marshal, and he is to be discharged upon the ground of the plaintiff's not having declared against him in due time, get a copy of causes from the clerk of the papers at the prison; then take out a summons requiring the plaintiff's attorney to attend, at the expiration of two days or more after the taking it out, before a Judge to shew cause why the defendant should not be discharged, &c. (*g*); and serve it upon the plaintiff's attorney or agent two days or more before it is returnable. One summons, so served, is sufficient. (*R. H. 2 W. 4, r. 89*). If the plaintiff's attorney consent to an order, get the consent indorsed on the summons, and the Judge will make an order accordingly; or, if the plaintiff's attorney shew cause, but the cause be not deemed sufficient, the Judge will make a like order; or, if the attorney do not attend, then, after waiting half an hour, make an affidavit of the service of the summons and of your attendance (*h*), and the Judge will make the order (*i*). In town causes this order is absolute in the first instance; but in country causes, it is usually but an order *nisi*, unless cause be shewn within four days or such other time as the Judge shall think reasonable, and which will afterwards be made absolute if no cause be shewn. (*R. H. 2 W. 4, r. 89*). Upon the order being made, serve a copy of it upon the plaintiff's attorney, enter a common appearance, as directed *Vol. 1, p. 454*, and get a certificate from the clerk of the common bails, of your having done so; pay 1s. Then take this certificate and order to the marshal's office, and the prisoner will thereupon be discharged without a *supersedeas*, upon payment of his fees.

But if the defendant be in custody of the sheriff, &c. and he is to be discharged upon the ground above mentioned,—get from the gaoler a certificate of the causes the defendant is charged with (*k*); and make an affidavit of the gaoler's having signed the same (*l*). Then take out a summons and obtain an order as is above directed (*m*). Write out a *præcipe* for the *supersedeas* on plain paper, and write out the *superse-*

(*f*) See the former rules, *R. T. 19 G. 3, K. B.*; *R. H. 6 & 7 G. 4, C. P.*, 3 *Bingh. 442*; by which, instead of one month, the time was six months.

(*g*) See the form, *Chit. Forms, 594*.

(*h*) See the form, *Chit. Forms*.

(*i*) See the form, *Chit. Forms, 594*.

(*k*) See the form, *Chit. Forms, 594*.

(*l*) See the form, *Chit. Forms, 595*.

(*m*) See the forms, *Chit. Forms, 594*.

*deas on a plain piece of parchment (o); and take them and the certificate of the clerk of the common' bails above mentioned to the signer of the writs, who will sign the supersedeas; pay him 1s. 8d.; get it sealed, pay 7d. And lastly, leave the writ with the gaoler of the prison, who will thereupon discharge the defendant upon payment of his fees (p).*

If the ground for discharging the defendant be that the plaintiff has not proceeded to trial, or final judgment, or execution, within due time, *proceed to obtain the summons and order as in the mode above mentioned; and, having obtained such order, proceed by entering a common appearance, &c. as above directed (q).*

*The effect of it.]* We have already partially considered the effect of a *supersedeas*, *ante*, p. 651. If the defendant be discharged by *supersedeas*, for want of proceedings before judgment, this does not prevent the plaintiff, after he has obtained judgment, from suing out a *ca. sa.*, and taking the defendant in execution; but if he be superseded for not having been charged in execution, he can never afterwards be arrested on the same judgment. (*R. T. 2 G. 1, c*) (*r*). In no case, however, can the defendant be again holden to bail for the same cause of action for which he has been superseded, whether superseded for want of proceedings before or after judgment; (*Vol. 1, p. 75*); not even in an action on the judgment (*s*); but, after judgment obtained in such latter action, the defendant may be taken in execution (*t*). And a *supersedeas*, even after judgment, cannot be pleaded in bar of such an action (*u*). After the *supersedeas* has been granted, but before the defendant is actually discharged, any other person may issue and serve a detainer against him, as a prisoner still in custody (*v*); but it seems that the same plaintiff cannot do so, even although for a different cause of action (*x*).

## 2. Discharge of a Prisoner under the Insolvent Acts.

### 1. Proceedings under the Lords' act, on the prisoner's own petition.]

The recent act of 11 G. 4 & 1 W. 4, c. 38, (passed 16th July, 1830,) suspends the operation of the Lords' act, so far as persons petitioning for their own discharge are concerned, for two years and thence to the end of the then next session of parliament; and that act is continued by the 2 & 3 W. 4, c. 44, s. 5, until the 1st June, 1835, and thence until the end of the then next session of parliament (*y*).

(o) See the forms, Chit. Forms, 595.

(p) See *Jones v. Lander*, 6 T. R. 754.

(q) See the form of a *supersedeas* for not proceeding to trial or final judgment, Chit. Forms, 597; the like for not charging the defendant in execution, Chit. Forms, 599.

(r) *Wright v. Kerswill*, Barnes, 376; *Lins v. Lowe*, 7 East, 330.

(s) *Hall v. Howes*, Hardw. 244. See *Pierson v. Goodwin*, 1 B. & P. 361.

(t) *Blandford v. Foot*, Cowp. 72; *Is-*

*may v. Dewin*, 2 W. Bl. 962.

(u) *Topping v. Ryan*, 1 T. R. 273.

(v) *Hutchins v. Kenrick*, 2 Bur. 1048; *Arundel v. Chitty*, 1 Dowl. P. C. 499, and cases *ante*, Vol. 1, p. 78.

(x) See *Gehagan v. Harper*, 1 H. Bl. 251, *ante*, Vol. 1, p. 77.

(y) As to the law and practice, when these clauses of the Lords' act were in operation, the reader is referred to Tidd's Practice, and Archbold's Pract. 2nd ed. Vol. 2, 135 to 140.

2. *Proceedings under the compulsive clauses of the Lords' act.*] If a person committed or charged in execution for a sum not exceeding 300*l.* (z) exclusive of costs, shall not, within three months after being so committed or charged, make satisfaction for the same: any of his creditors, upon giving him twenty days' notice in writing of his intention, may require him to give in a true account in writing, and signed by him, of all his real and personal estate, and of all incumbrances affecting the same; (32 G. 2, c. 28, s. 16; 26 G. 3, c. 44, s. 2; 33 G. 3, c. 5, s. 3); and, if in execution at the suit of any one creditor for a sum of 300*l.* or under, although the aggregate amount of his debts may be much more, the prisoner may be brought up, at the instance of that creditor, under this clause of the act (a). A prisoner in custody under an attachment for nonpayment of costs in pursuance of an award, is within the meaning of this clause (b). But where a prisoner has petitioned for his discharge under the insolvent act, and the insolvent court has not decided on the merits of his petition, the Court will not compel him to assign under these compulsory clauses of the Lords' act (c). And generally, the Court will not interfere against the prisoner where he is honestly proceeding to do that which will obtain for his creditors a fair distribution of his property (d). If the prisoner be in execution under any process from one of the Courts at Westminster, or removed by *habeas corpus* to, or charged in execution in the prison of such Court, the creditor may require the prisoner to give in the account above mentioned to such Court, within the first seven days of the term next after the expiration of the twenty days' notice; or if the prisoner be charged in execution in a prison belonging to any other Court of record, then to such Court, at the second Court to be held after the expiration of the said twenty days; or if the prisoner be in execution in any county or other gaol more than twenty miles distant from Westminster Hall or the Court out of which the process issued, then he is to give in the account aforesaid upon oath, at the assizes or great sessions of the county to which the prison belongs, which shall be holden next after the expiration of the said twenty days' notice. (32 G. 2, c. 28, s. 16). The notice, of course, must be framed accordingly. *Make two copies of it, serve one upon the prisoner personally, and annex the other to the affidavit of such personal service as hereafter mentioned.* It is sufficient if the notice be served twenty days before the defendant is brought into Court, and the act does not require the notice to be served twenty days before the first day of the term.

The creditor must next give a similar 20 days' notice to the other creditors, at whose suit the prisoner is "detained or charged in custody." This notice must be given to the creditors themselves if they

(z) See *Barker v. Slater*, 2 D. & R. 165.

(a) *Chappell v. Ashley*, 5 B. & Ald. 537, 1 D. & R. 25, S. C. See *Barker v. Slater*, 2 D. & R. 165.

(b) *Rea v. Curwen*, 8 Taunt. 57, 1

Moore, 494, S. C. See the form of the notice, Chit. Forms, 599.

(c) *Evans v. James*, 1 M. & Scott, 309, 1 Dowl. P. C. 260, S. C.

(d) Id.

*Discharge of, under compulsive Clauses of Lords' Act. 655*

can be met with; if not, to the attorney or attornies last employed by them in their actions, &c. against the prisoner. (32 G. 2, c. 28, ss. 16, 17). A personal service is not, it seems, requisite (e).

The creditor must also give a like notice to the sheriff or gaoler in whose custody the prisoner is detained, of his intention to have the prisoner brought up, and requiring the sheriff, &c. to bring up the prisoner accordingly; which notice must be given 20 days at least before the time appointed for bringing up the prisoner. And thereupon the sheriff, &c. shall, at the costs of such creditor, cause the prisoner to be brought up to the Court aforesaid, as by the notice he shall be required, together with a copy of causes of his detainer. (32 G. 2, c. 28, s. 16) (f).

Previously to the prisoner's being brought up, the creditor should prepare his petition, and have affidavits made as to the delivery of the several notices above mentioned, and should obtain a copy of the causes from the gaoler. Leave this petition, affidavits, and copy of the causes with the clerk of the rules; he will draw up a rule of Court, directing the prisoner to be brought into Court on a day to be named in the rule. Serve this rule on the gaoler, on the prisoner, and on the detaining execution creditors, two days at the least before the day appointed for the prisoner to be brought into Court; and the service must be in the same manner as above directed with respect to the notices.

It is too late to move to bring up the prisoner on the seventh day in term, it being impossible to bring up the prisoner in the course of that day (g).

When the prisoner is brought up, he shall, after the petition and affidavits are put in, deliver in open Court, upon oath, "a full, true, and just account, disclosure, and discovery in writing, of the whole of his real and personal estate, and of all books, papers, writings, and securities relating thereto, and of all incumbrances then affecting the same, and the respective times when made, to the best of his knowledge and belief, (other than and except the necessary wearing apparel and bedding of such prisoner and his family, and the necessary tools or instruments of his trade or calling, not exceeding the value of 10*l.* in the whole); which account shall be subscribed with the proper name or mark of the prisoner." (32 G. 2, c. 28, s. 17) (h).

The act gives no authority to remand a prisoner refusing to give in an account of his property otherwise than generally (i). Where an insolvent was brought up at the assizes under this act to deliver in a schedule of his estate and effects, and, not being prepared to do so, was remanded generally, and more than 60 days would have elapsed before the next assizes; the Court, at the instance of the

(e) *Chappel v. Ashley*, 5 B. & Ald. 749, 1 D. & R. 394, S. C. See the form of the notice, Chit. Forms, 600.

(f) See the form, Chit. Forms, 601.

(g) *Acraman v. Harrison*, 8 Bingh. 154, 1 M. & Scott, 240, 1 Dowl. P. C.

254, S. C.; and see *Langdon v. Rossiter*, M'Clel. 6, 13 Price, 186, S. C.

(h) See *Hutchins v. Heskeith*, 1 B. & P. 143.

(i) *Langdon v. Rossiter*, M'Clel. 6, 13 Price, 186, S. C.

prisoner, made an order upon the gaoler to bring him up at the subsequent assizes for examination, notwithstanding the lapse of 60 days<sup>(k)</sup>. The Court may allow the prisoner further time to make the disclosure, &c.; and in a late case they did so, where he had petitioned the insolvent court for his discharge, and the petition had not been heard<sup>(l)</sup>.

When the prisoner shall have delivered in the account aforesaid, his estate and effects shall be assigned by him (by a short assignment on the back of the account above mentioned) to such person as the Court shall direct, in trust for the petitioning creditor, and for such other of the creditors as will, before the assignment, by a memorandum in writing and signed by them, consent to the prisoner's being discharged out of custody, and agree to accept a proportionable dividend of the estate with the petitioning creditor; and if any surplus remain, after the payment of the debts due to the petitioning creditor and to the creditors who have consented to the prisoner's discharge as aforesaid, and of all reasonable expenses in getting in the effects, it shall be paid over to the prisoner, or to his executor or administrator. (32 G. 2, c. 28, s. 17). No stamp is requisite for the assignment. (*Id.*)

Upon the assignment, &c. being made to the satisfaction of the Court, the prisoner shall be discharged as to all actions against him by the petitioning creditor, and by such creditors as shall have signed the consent aforesaid. (32 G. 2, c. 28, s. 17). No stamp is requisite for any rule or order made for any such discharge. (*Id.*) If, however, the prisoner refuse or neglect (without just cause) to deliver in a schedule of his estate, within the time aforesaid, or within 60 days then next following, or refuse to assign or convey the same according to the order of the Court, he shall, upon conviction of the same upon indictment, be transported for seven years. (32 G. 2, c. 28, s. 17).

The Court are bound to allow the prisoner the 60 days mentioned in this section, though he even refuses to claim them<sup>(m)</sup>.

3. *Proceedings under stat.* 48 G. 3, c. 123, s. 1.] All persons in execution upon any judgment<sup>(n)</sup>, in whatsoever Court the same may have been obtained, for any debt or damages not exceeding the sum of 20*l.* exclusive of costs, and who shall have lain in prison for the space of twelve successive calendar months next before the time of their application, shall, upon application for that purpose in term time, made to some one of his Majesty's Courts at Westminster, to the satisfaction of such Court, be forthwith discharged out of custody as to such execution by the rule or order of such Court. These 12 months are reckoned inclusive of the day the party was charged in

(k) *Rex v. Belk*, 7 D. & R. 234; and see *Goldsmith v. Taylor*, 7 Moore, 370.

(l) *Re Payne*, 8 Bingh. 194.

(m) *Pierce v. Davidson*, 1 Dowl. P. C.

496.

(n) See *Rex v. Dunne*, 2 M. & Sel. 201; *Roylance v. Hewling*, 3 Id. 282.

execution (o). The statute applies only to persons in execution upon judgments in civil actions (p). It does not extend to a party in execution under a writ *de contumace capiendo* (q), or on an attachment (r). It seems it does not extend to *plaintiffs* in execution (s). Where a defendant had given a warrant of attorney for debt and costs to an amount exceeding 20*l.*, although the original claim was less, and had remained in execution for that amount twelve successive months, he was held not entitled to his discharge under the act (t). Nor, as it seems, is a party in execution for more than twelve successive months for the nominal damages in an ejectment exceeding 20*l.* (u). It is no ground for refusing a party his discharge under the act, that he had been brought up under the compulsory clauses of the Lords' act, and has refused to deliver in his schedule (x). The statute contemplates cases where there might be proceedings against the *property* of the debtor (y). On an application for a prisoner's discharge under this act, it was objected, that within the 12 months he had several times broken the rules of the King's Bench prison; the Court referred it to the master of the crown office, to inquire into that fact, and if he found the prisoner had been out without a day rule, he was not to be discharged (z).

The application under this statute must be made to the Court in term time, and cannot be entertained before a Judge at chambers (a). The mode of proceeding as pointed out by Mr. Chapman (b) in his useful work on the practice of this Court, is thus: Obtain from the keeper of the prison in which the defendant is confined a certificate of his commitment, with a copy of the causes. Serve a notice (c) on the plaintiff (d) or agent, of the defendant's intention to apply to the Court for his discharge. The signature to the gaoler's certificate must be verified by affidavit. Make also an affidavit of service of the notice on the plaintiff; the defendant must also make an affidavit (e) that the debt or damages for which he is confined in the action do not exceed 20*l.*, exclusive of the costs; and that he has been confined in prison thereon for the space of twelve calendar months. Give the gaoler's certificate and the affidavits, with a brief, for counsel to move for the defendant's discharge, and the rule will be absolute in the first instance. (R. H. 2 W. 4, r. 90) (f). Draw up a rule, serve a copy on the plaintiff's attorney or agent, and deliver the original rule to the

(o) *Anon.* 1 Dowl. P. C. 150.

(p) *Rex v. Hubbard*, 10 East, 408; *Lewis v. Morland*, 2 B. & Ald. 61; *Rex v. Dunn*, 2 M. & Sel. 201; *Rex v. Clifford*, 8 D. & R. 58.

(q) *Ex p. Kaye*, 1 B. & Adol. 652.

(r) *Doe Upton v. Bewson*, 1 Dowl. P. C. 15.

(s) See *Tinmouth v. Taylor*, 10 B. & C. 114; *sed vide Roylance v. Hewling*, 5 M. & Sel. 282.

(t) *Anon. v. White*, 1 Dowl. P. C. 19; *Chapm. Pract.* 330; *Robinson v. Lunnell*, 6 Moore, 287. The reason, however, for such decision seems doubtful.

(u) *Doe v. Reynolds*, 10 B. & C. 481; *sed vide Doe v. Roe*, 1 Dowl. P. C. 69, *contra*.

(x) *Ex p. White*, 1 Dowl. P. C. 66.

(y) *Ex p. Kaye*, 1 B. & Adol. 653.

(z) *Day v. Thomas*, Mich. 1826, *Chap. Prac.* 330.

(a) *Kelly v. Dickinson*, 1 Dowl. P. C. 546.

(b) *Chap. Prac.* 327.

(c) See the form, *Chit. Forms*, 601.

(d) *Infra*.

(e) See form, *Chit. Forms*, 602.

(f) See *Davies v. Rogers*, 2 B. & C. 804, 4 D. & R. 361, S. C.

sheriff or keeper of the prison in which the defendant is confined, to warrant the discharge. It is not absolutely necessary to give notice for the application, but it is a great saving of expense to the prisoner; for if no notice be given, it is only a rule *nisi* (g) in the first instance; that rule must be served on the plaintiff's attorney or agent, an affidavit of the service made, and a brief given to counsel "to move to make the within rule absolute;" if no sufficient cause be shewn, the rule will be made absolute of course, and must then be drawn up and served as above (h). The name of the cause stated in the notice must correspond with the name of that in which he is in execution (i). The notice must be served on the plaintiff; and therefore service on his attorney is not in general sufficient, for his authority ceased with the judgment (k). But where the plaintiff's residence cannot be found, service of the notice on his attorney may suffice (l). The prisoner is entitled to his discharge as a matter of right, if the Court are satisfied as to the fact of his imprisonment for twelve months, &c. (m).

If notice of the application for the discharge was given, and the application be successfully opposed in the first instance, no costs are allowed to the opposing creditor (n).

If the prisoner's discharge be unduly or fraudulently obtained by a statement to the Court, which, if true, would entitle him to be discharged under the act, he is liable to be again taken in execution, and remanded by rule of court; but the sheriff or keeper of the prison who may have discharged him under a rule so obtained, is not to be liable to an action for an escape in consequence of such discharge. (48 G. 3, c. 123, s. 1). If, therefore, a prisoner obtain his discharge fraudulently, an application must be made to the Court for "liberty to sue out a new *ca. sa.* against the defendant;" this must be supported by an affidavit of facts, to shew in what manner the discharge was improperly obtained; give a brief to counsel with the affidavit to move for the rule; it is a rule *nisi* and must be served on the defendant, but does not require personal service; make an affidavit of service and give a brief to counsel to move to make the rule absolute: if the rule be made absolute, then sue out the *capias ad satisfaciendum* in the usual way (o).

4. *Subsequent proceedings against Insolvents.*] By a discharge under the Lords' act, the debtor's person is for ever freed from arrest for the same debt (p); even if he subsequently promise payment, it has been considered he cannot be holden to bail on such subsequent promise (q). The judgment, however, remains in force; and execution

(g) See *Ex p. Neilson*, 7 Taunt. 37; *Magnay v. Wilkes*, Id. 467.

(h) *Cowley v. Bussell*, 4 Taunt. 460; *Mence v. Graves*, Id. 854; *Nicholls v. Neilson*, 6 Id. 493; *Baker v. Sydee*, 7 Id. 179.

(i) *Kelly v. Dickinson*, 1 Dowl. P. C. 537.

(k) *Kelly v. Dickinson*, 1 Dowl. P. C. 546.

(l) *Wilson v. Mokler*, 1 Dowl. P. C. 549.

(m) *Stacey v. Fieldsend*, 1 Dowl. P. C. 700.

(n) *Anon.* 1 Dowl. P. C. 148.

(o) *Chapm. Prac.* 330.

(p) See *Workman v. Leake*, Cowp. 22, 23, n.; *Pugett v. Wheats*, 2 Doug. 669.

(q) MS. M. 1814; *Wilson v. Kemp*, 3 M. & Sel. 595; Vol. 1, p. 71. But this seems questionable; and see *Horton v. Moggridge*, 6 Taunt. 563, n.; *Hatt v. Verdier*, 2 W. Bl. 724.

may at any time be sued out against the debtor's "lands, tenements, rents, or hereditaments, goods, or chattels," other than and except his wearing apparel, tools, &c. to the amount of 10*l.*, as before mentioned. (32 *G. 2*, c. 28, s. 20). As to the mode of proceeding in such a case, *see ante*, p. 607; and *post*, Ch. 9, s. 2.

### 3. *Discharge of Prisoners by other Means.*

A prisoner will be entitled to his discharge, if the attorney whose name is indorsed on the writ declares that it was not issued by him or with his authority or privity. (*Vol. 1*, 29).

As to what defects in an affidavit to hold to bail, or in a writ of *capias*, will entitle the prisoner to his discharge, *see Vol. 1*, 82 to 111.

A prisoner shall be discharged upon putting in and perfecting bail, at any time before judgment. (*See Vol. 1*, p. 179).

A prisoner shall also be discharged, when the action is abated, discontinued, or decided in his favour. So, if the prisoner settle or compromise the debt with the plaintiff, the plaintiff (or more properly his attorney) shall give the defendant a discharge in writing; and upon this being lodged with the marshal or gaoler, the prisoner shall be discharged. (*See Vol. 1*, 128, 437) (*r*). Or if, after judgment, he pay the amount of it to the plaintiff or his attorney, they are bound at their peril to discharge him; and where a defendant in execution tendered the amount of the judgment to the plaintiff and to his attorney, and required them to sign his discharge, which they refused to do, unless he would also satisfy a demand they had on him for costs on another account, the Court held that the defendant might maintain an action on the case against them for his subsequent detention (*s*). As the attorney, in strictness, has a lien on the judgment for the amount of his costs, (*see Vol. 1*, 54, 437), the discharge, more properly, should be given by him, as above mentioned; but a discharge by either will be sufficient. And where a plaintiff, having his debtor in execution for 500*l.*, entered up satisfaction on the roll by a different attorney from that he had employed in the cause, upon the defendant's agreeing to pay him 120*l.* at a future time: upon a motion to discharge the defendant, which was opposed by the plaintiff's attorney, on the ground of his lien, the Court held that, although there appeared to be a fraudulent collusion between the plaintiff and the defendant, they had no power to detain the defendant in prison after satisfaction was entered up on the record (*t*). If the prisoner be in execution at the time of his discharge, his discharge amounts to a satisfaction of the debt, even although he was discharged upon giving a security, which, on account of an informality, afterwards became unavailable; (*ante*, *Vol. 1*, 414) (*u*); but otherwise, if he were in custody upon mesne process merely (*x*).

(*r*) *See Butt v. Conant*, 3 B. & B. 3, 6 Moore, 65, S. C.

(*s*) *Crozer v. Pilling*, 6 D. & R. 129, 4 B. & C. 26, S. C.

(*t*) *Marr v. Smith*, MS. E. 1821, 4 B. & Ald. 466, S. C.; *ante*, Vol. 1, 54.

(*u*) *Jacques v. Witherly*, 1 T. R. 557.

(*x*) MS. H. 1822, *ante*. Vol. 1, 414.



If a prisoner become bankrupt, and obtain his certificate, if the debt for which he is in custody be provable under his commission, he shall be discharged out of custody upon application to a Judge at chambers. (6 G. 4, c. 16, s. 126) (y). Even before he obtains his certificate, if the plaintiff elect to prove under the commission, he must first discharge the defendant out of custody, before he will be permitted to prove. (6 G. 4, c. 16, s. 59) (z).

Also, in a case where the wife of a prisoner became administratrix to the plaintiff, the Court ordered the defendant to be discharged (a); and the Court of Common Pleas have gone so far as to discharge a prisoner in execution, after the plaintiff's death, upon service of a rule nisi upon the next of kin, and no cause shewn, it appearing that the next of kin did not intend to administer (b).

But that Court refused to discharge a defendant out of custody in execution at the plaintiff's suit, although the application was not made until eighteen months after the death of the latter, it appearing that he had appointed executors who were still alive, and had not assented to the discharge (c). And where administration had been taken out, that Court refused, without the authority of the administratrix, to discharge the defendant out of execution after the death of the plaintiff, although his administratrix and the assignees of the defendant, who had been a bankrupt, disclaimed all interest in the action (d).

(y) See Arch. Bkt. L. 210, 281, 4th ed.

(a) See Arch. Bkt. L. 109.

(b) *Pyne v. Erle*, 8 T. R. 407.

(c) *Parkinson v. Horlock*, 2 New Rep. 240; *Broughton v. Martin*, 1 B. & P. 176; and see *Rex v. Davis*, Id. 336; but

see *Holmes v. Murcott*, 1 Bingh. 431, 8 Moore, 529, S. C.

(d) *Dunsford v. Gouldsmith*, 8 Moore, 145.

(e) *Fothergill v. Walton*, 4 Bingh. 711, 1 M. & P. 743, S. C.

## CHAPTER V.

## ACTIONS BY AND AGAINST EXECUTORS OR ADMINISTRATORS:

## SECT. 1.

*Actions by Executors or Administrators.*

• *Limitation of action.*] IF the time limited by the statute have not expired before the death of the testator or intestate, the executor or administrator may bring the action at any time within a year after the death (a); or, if the time limited have not expired within the year after the death, at any time before the expiration of such limited time. And if the executor bring an action, and die before judgment, his executor may bring a fresh action within a reasonable time afterwards (b). In an action by an administrator upon a bill of exchange payable to the intestate, but accepted after his death, it was holden that the statute began to run from the grant of the letters of administration, and not from the time the bill became due, there being no cause of action while there is no party capable of suing (c). By the recent act 3 & 4 W. 4, c. 42, s. 2, executors and administrators may bring an action for an injury to the real estate of the testator or intestate, provided the injury was committed within six months before the death of the testator or intestate, and provided the action be brought within a year after his death.

*Process, &c.*] Though the plaintiff sue as executor or administrator, the process need not it seems, in this Court or in the Exchequer, state him as such; but the practice in the Common Pleas, at least in bailable cases, is different (see Vol. 1, 101); and to avoid any doubt on the question, it is best to describe him in such cases as executor or administrator. An executor or administrator may swear to the debt according to his belief; he is not obliged to swear positively to it, as he would otherwise be if he were not suing in *auter droit*. (*Ante*, Vol. 1, 84) (d). Executors who have holden a party to bail without reasonable or probable cause, for a debt due to their testator, are within the 43 G. 3,

(a) Bul. N. P. 150.

(b) 1d. See *Knight v. Bate*, Cowp. 738, 11 Mod. 455, S. C.(c) *Murray v. East India Company*, 5 B. & Ald. 204; and see *Douglas v. For-*  
VOL. II.*rest*, 1 M. & P. 663, 4 Bingh. 686, S. C. *post*, 663.

(d) See form of affidavit to hold to bail, by executor or administrator, Chit. Forms, 21.

c. 46, s. 3, *post*, *tit. Costs* (e). If the plaintiff in an action, after having arrested the defendant, die, and the suit thereby abates, his executors may again arrest the defendant for the same cause of action (f).

It is not necessary for the executor or administrator of an attorney, before the commencement of an action, to deliver a bill of costs for business done by his testator or intestate (g).

*Declaration, &c.*] We have already seen how far the declaration should correspond with the process or affidavit to hold to bail in bailable cases. (*Vol. 1, p. 190.*) The declaration is filed or delivered in the same manner as in ordinary cases.

The defendant may bring money into court (h).

The subsequent proceedings, together with the verdict, *postea*, judgment, and execution, are also the same as in ordinary cases (i). As to *scire facias* by an executor, &c. to revive a judgment obtained by his testator, &c. *see ante*, p. 601 to 604.

*Costs.*] If the verdict be for the plaintiff, he is of course entitled to costs, as in ordinary cases. But previously to the recent act, 3 & 4 W. 4, c. 42, s. 31, if the verdict were given for the defendant, the plaintiff in such case was not liable to costs (k), unless the cause of action accrued after the testator's or intestate's death (l), and the plaintiff might have brought the action in his own right (m). Also, previously to that act, the plaintiff was not liable to the costs of a nonsuit, unless the action were such that he might have brought it in his own right (n); nor to costs on judgment as in case of a nonsuit (o). He was always, even before that act, liable to the costs of a *nonpros* (p); and to costs upon a discontinuance (q), or for not proceeding to trial according to notice (r), if he had knowingly brought a wrong action, or been guilty of a wilful default (s); otherwise not (t). And now,

(e) *Footy v. Reed*, 5 B. & Ald. 515 a; *Dronefield v. Archer*, Id. 513, 1 D. & R. 67, S. C.

(f) *Mellin v. Evans*, 1 C. & J. 82; *ante*, Vol. 1, p. 77.

(g) *Ante*, Vol. 1, p. 46. As to taxing the bill, *see* Id. 49.

(h) *Crutchfield v. Scott*, 2 Stra. 796.

(i) *See* Chit. Forms, 603.

(k) *Nicolas v. Killgrew*, 1 Ld. Raym. 436; *Martin v. Norfolk*, 1 H. Bl. 528; *Wilton v. Hamilton*, 1 B. & P. 445.

(l) *Bollard v. Spencer*, 7 T. R. 358; *Hollis v. Smith*, 10 East, 293; *Goldthwaite v. Petrie*, 5 T. R. 234.

(m) *Goldthwaite v. Petrie*, 5 T. R. 234; *Cockerill v. Kynaston*, 4 T. R. 277; *Cooke v. Lucas*, 2 East, 395. As in trover for a conversion after the testator's death. (*Grimstead v. Shirley*, 2 Taunt. 116). Even if the declaration in an action by an executor or administrator contained a count on an account stated with the plaintiff, as executor or administrator, and promise to him as such, he would, if he were nonsuit-

ed, or defendant obtained a verdict, be liable to the costs even before the above act. (*Doubbiggin v. Harrison*, 9 B. & C. 606; *Jobson v. Forster*, 1 B. & Adol. 6; *Slater v. Lawson*, Id. 893.) But, in such case, as far as the pleadings were concerned, the defendant would be entitled to the costs of that count only. (Id. and R. H. 2 W. 4, r. 74.)

(n) *See* the instances mentioned in note (m), *supra*. *Hollis v. Smith*, 10 East, 293; *Cockerill v. Kynaston*, 4 T. R. 277; *Barnard v. Higdon*, 3 B. & Ald. 213; 2 Ld. Raym. 865.

(o) *Booth v. Holt*, 2 H. Bl. 277; *Bennet v. Coker*, 4 Bur. 1928.

(p) *Higgs v. Warry*, 6 T. R. 654; *Hawes v. Saunders*, 3 Bur. 1584.

(q) *Melhuish v. Maunder*, 2 New Rep. 72, 1 Chit. Rep. 629, n.

(r) *Nunez v. Modigliani*, 1 H. Bl. 217; 3 Bur. 1585.

(s) *Harris v. Jones*, 1 W. Bl. 451, 3 Bur. 1451, S. C.

(t) *Bennet v. Coker*, 4 Bur. 1927.

by that act, "in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall (unless the Court in which such action is brought, or a Judge of any of the said superior courts, shall otherwise order) be liable to pay costs to the defendant in case of being non-suited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner."

If the plaintiff resides abroad he may be compelled to give security for costs (u).

SECT. 2.

*Actions against Executors or Administrators.*

Executors and administrators are not, unless expressly named, within the statutes by which courts of conscience have been established (w); and consequently they may be sued in this Court, however trifling the cause of action may be. Also, it may be necessary to remark, if the defendant be an attorney or officer of the Court, yet he is not entitled to his usual privileges, when thus sued as an executor, &c. (*Ante*, p. 631.)

An action cannot be maintained against an executor until he has taken upon himself to act as such, or proved the will. Therefore, where a testator died abroad more than six years before the commencement of the suit, but his executors in this country had not proved the will, nor in any manner acted as executors, until within six years, the Court of Common Pleas held that the statute of limitations was no bar (x).

*Process, &c.*] The executor or administrator need not be described as such in the process. (*Ante*, Vol. 1, p. 101, 102.) Executors or administrators cannot be holden to bail, unless in cases where they have promised, in writing, to pay the debts of their testator or intestate, or (under a Judge's order) when they have been guilty of a *devastavit*. (Vol. 1, p. 73.)

The declaration is filed or delivered as in ordinary cases.

*Plea, &c.*] If the defendant allow judgment to go by default, or expressly confess the action, this is deemed a confession of assets, and

(u) *Chevalier v. Finnis*, 3 Moore, 602, 1 B. & B. 277, S. C.; *post*, Book 4, Part I. Chap. 12.

(w) *Ailway v. Burrows*, Doug. 263; *Webb v. Brown*, 5 T. R. 535.

(x) *Douglas v. Forrest*, 1 M. & P. 663, 4 Bingh. 686, S. C.; and see *Murray v. East India Company*, 5 B. & Ald. 204; *ante*, 661.

he will be estopped from denying it afterwards in an action on the judgment suggesting a *devastavit* (z). He should therefore take care to plead regularly to the action, unless he wish to acknowledge assets.

If he plead the general issue or specially, the plea is delivered or filed, as in ordinary cases. On account of costs, it is not advisable to plead any false plea. (*See post*, 667.) The plea of *plene administravit*, or *ne unques executor*, &c. when pleaded singly, must be delivered to the plaintiff's attorney, and not filed; nor need they be signed by counsel. (*Vol. 1, p. 207.*) But if the defendant plead the general issue and *plene administravit*, or any other double plea, he must of course file them with the clerk of the papers, as directed *Vol. 1, p. 209 (a)*.

If the defendant plead *plene administravit*, or *plene administravit præter*, alone, the plaintiff in his replication may either deny it; or he may confess it, and pray judgment of assets *in futuro*, upon the former plea (b); or, upon the latter, take judgment presently of the assets acknowledged to be in the hands of the defendant, and of assets *in futuro* for the residue. In the latter case, the plaintiff may sign judgment of assets *quando acciderint*, &c. (c), (after executing a writ of enquiry, when necessary; *see ante*, p. 491, 509); and when assets afterwards come to the hands of the executor, he may proceed against him by *scire facias*, as directed *ante*, p. 608. But if the defendant plead either of the pleas above mentioned, and also the general issue or other plea, and the plaintiff deny *both* in his replication, the issue is then made up and the parties proceed in the ordinary way; or if the plaintiff add the *similiter* to the general issue, and confess the plea of *plene administravit*, &c. and pray judgment of assets *in futuro*, &c. as above mentioned, then, after entering the replication in the issue, enter an award of the *venire* in this form: "*But because it is uncertain whether the defendant will be convicted upon the said issue above joined between the parties aforesaid, therefore let judgment be thereupon stayed until the trial and determination of the said issue; and in order to try the said issue, let a jury thereupon come,*" &c. as in ordinary cases (d). In this latter case, if the plaintiff have a verdict, judgment is signed, and he proceeds as in ordinary cases against an executor who has pleaded a false plea; so that if such plea be false within his own knowledge, (as a plea of *ne unques executor*, or the like,) he would be personally liable, not only for the costs, but also, it seems, for the debt, and judgment and execution might

(z) *Skelton v. Hawling*, 1 Wils. 258; but see *Bird v. Culmer*, Hob. 178.

(a) Before the 2 W. 4, c. 39, and the rule of M. T. 3 W. 4, r. 15, *ante*, Vol. 1, p. 189, if the declaration was intitled generally of the term, although not filed, &c. or the action commenced until after the first day of it, and the defendant wished, under the plea of *plene administravit*, to give in evidence an administration of assets upon the first or other day of the term previous

to the commencement of the action, he should have moved the Court that the plaintiff be obliged to intitle his declaration specially of the day when filed or delivered; *Southouse v. Allen*, Hardw. 141; or he might, as he now may give in proof, at the trial, the time at which the action was really commenced. *Mann v. Adams*, 1 Sid. 432.

(b) See a form, Chit. Forms, 605.

(c) See *Mara v. Quin*, 6 T. R. 1.

(d) See form, Chit. Forms, 610.

be issued against him accordingly; (*see post*, 666); or if not false within his own knowledge (as a plea that the *testator* did not promise, or the like,) he would be personally liable for the costs, and the judgment signed against him would be of assets, *quando*, &c., upon which the plaintiff might afterwards, when assets came to defendant's hands, have a *scire facias*, as is above mentioned, for the debt, and immediately have a *fi. fa.* or *ca. sa.* for the costs *de bonis testatoris, et si non de bonis propriis* (*e*).

It is well settled, that if an action be commenced against an executor or administrator for any specific debt, it must be preferred by him in payment to others of the same class; and in that case, the executor or administrator would not be warranted in making any voluntary payment of such other debts to defeat the party of his remedy (*f*). Yet although one creditor commence an action, if another creditor, in equal degree, commence a subsequent action, and first recover judgment, he must be first satisfied. Hence an executor or administrator has it in his election to give a preference, by confessing judgment on the action of the one, and pleading such judgment to the action of the other (*g*). In case, therefore, a hostile creditor bring an action, and there be not sufficient assets to divide amongst the creditors, and the executor be desirous of making an equal division, or favouring any particular creditor or creditors of the same class, in preference to the hostile plaintiff, the course to be adopted is, to get one or more of the friendly creditors, whose debt, or joint debts, will fully cover the assets in hand, immediately to bring a friendly action or actions, and declare therein in the common form of debt, and let defendant suffer judgment against him by default; and, on this being effected, then to plead the judgment to the declaration of the hostile creditor. If such judgment be recovered after pleading to the action by the hostile creditor, and before trial, he may plead it *puis darrien continuance* (*h*).

If a warrant of attorney be given by one of several executors, to confess a judgment against all, the Courts will order it to be delivered up, &c. (*i*).

The verdict is in the affirmative or negative of the issue, as in ordinary cases (*j*).

*Judgment.*] The ordinary judgment against an executor or administrator is, that the debt, damages and costs, or the damages and costs, shall be levied *de bonis testatoris* in the hands of the defendant, if he have so much thereof in his hands to be administered; and if not, then the costs to be levied *de bonis propriis* (*k*).

If an executor plead judgments obtained against himself, and any

(*e*) See *Marshall v. Wilder*, 9 B. & C. 655; 1 Saund. 336 b, (n. 10); and Chit. Forms, 611.

(*f*) 11 Vin. Abr. 296; Com. Dig. Admin. c. 2; Toller, 288, 289.

(*g*) Id.; Off. Ex. 145.

(*h*) *Lyttleton v. Cross*, 5 D. & R. 175, 3 B. & C. 317, S. C.; *Prince v. Nicholson*, 5 Taunt. 665, 1 Marsh. 280, S. C.;

*Kitchen v. Bartsch*, 7 East, 53.

(*i*) *Elwell v. Quash*, 1 Str. 20; ante, 497.

(*j*) See form of *postea* for plaintiff, Chit. Forms, 610; for defendant, Id. 611.

(*k*) 1 Saund. 336; and see *Rouse v. Etherington*, 1 Salk. 312, 2 Ld. Raym. 870, S. C. See form, Chit. Forms, 611.

one or more of them be avoided by the plaintiff's pleading, the plaintiff shall have judgment against the executor *de bonis propriis* (l). But if he had pleaded judgments obtained against the testator, and that he had not sufficient to satisfy them or any of them; if any one or more of the judgments be avoided, still there ought not to be a general judgment against the executor, or at least not until so many of the judgments are avoided as to leave assets in the executor's hands (m).

If the defendant plead a plea which is false within his own knowledge, (as *ne unques executor or administrator*, or the like,) and it be found against him, the judgment is *de bonis testatoris si, &c. et si non, &c. de bonis propriis*, or perhaps unconditionally *de bonis propriis* (n).

In an action against an executor or administrator, suggesting a *devastavit*, the judgment against the defendant shall be *de bonis propriis* (o). But where the action is brought against the executor of an executor, suggesting a *devastavit* by the former executor, the judgment against the defendant will be *de bonis testatoris* (p).

Where an executor or administrator is charged and made liable as assignee, the judgment is of course *de bonis propriis* (q).

As to the judgment of assets *quando*, &c. it has already been sufficiently treated of, *ante*, p. 608 (r).

The judgment on demurrer, on issue of *nul tiel record*, by confession or *nil dicit*, is interlocutory or final, as in other cases. If interlocutory, it is the same as in ordinary cases; after which follow the award of the enquiry, return, and final judgment, as stated *ante*, p. 519. The final judgment is the same as that upon verdict above mentioned.

*Costs.*] If there be a verdict for the defendant, he is entitled to costs as in ordinary cases. So if the defendant plead several pleas, and issue be taken on any one of them which is a total bar to the action, (as *plene administravit*, or the like,) and the verdict thereon be found for the defendant, he will as in other cases be entitled to the costs of the trial (s).

When the defendant pleads *plene administravit* or judgments outstanding, and *plene administravit præter*, and the plaintiff admitting the truth of the plea takes judgment of assets *in futuro*, the defendant is not liable to costs (t). Nor does he seem liable thereto when he pleads *plene administravit præter*, and the plaintiff admitting the truth

(l) 1 Saund. 337, a, (n). See *Marshill v. Wilder*, 9 B. & C. 655.

(m) Id.; but see several cases cited there to the contrary.

(n) Bro. Executors, 34; Cro. Jac. 648; 1 Saund. 336 b.

(o) 1 Saund. 336 c, (n. 1).

(p) 1 Saund. 219 e, (n).

(q) *Tilney v. Norris*, 1 Salk. 309, 1 Ld. Raym. 553, S. C.

(r) See forms of entry of judgment of assets *quando*, &c., where *plene administravit* is pleaded and confessed, Chit.

Forms, 605, 606; the like where the plea is denied, and verdict upon it for defendant, Id. 611; and see form of *scire facias* on judgment *quando*, Id. 617.

(s) *Edwards v. Bethel*, 1 B. & Ald. 254; *Ragg v. Wells*, 8 Taunt. 129; *Marshill v. Wilder*, 9 B. & C. 657; *Hogg v. Graham*, 4 Taunt. 135. See *vide Hindsley v. Russell*, 12 East, 232; *Postan v. Stanway*, 5 East, 261.

(t) Tidd, 9th ed. 980; *Hindsley v. Russell*, 12 East, 232.

of the plea takes judgment of the assets admitted in part, and for the residue of assets *in futuro* (u). It was formerly the practice in these cases not to allow the plaintiff his costs, even out of the future assets; but in a modern case, the Court held that the plaintiff was entitled to them out of such assets, and that judgment might be entered for them accordingly (v).

If an executor or administrator plead a plea which is false within his own knowledge, (as *ne unques executor* or *administrator*, or a judgment recovered against himself, or the like,) he is liable to costs to be levied *de bonis propriis* absolutely; or if he plead a plea which is false, but not so within his own knowledge, (as that the testator or intestate did not promise, or a judgment recovered against the testator or the like,) he is liable to costs to be levied *de bonis propriis* conditionally, provided there be not goods of the testator sufficient to satisfy them. (*Ante*, p. 664, 666) (x). Where the defendant pleads a false plea and *plene administravit*, if the plaintiff take judgment of assets *in futuro* upon the latter plea, and go to trial upon the other plea, he will be entitled to costs if he obtain a verdict, and therefore in such case it is usual for him to move the Court, or to apply to a judge, to withdraw the false plea, which he will be permitted to do on payment of costs (y).

*Execution.*] On an ordinary judgment against an executor or administrator, the usual writ of execution against him, for the recovery of the debt, is a *fiery facias de bonis testatoris* or *intestatoris* (z); but if the sheriff return to this writ *nulla bona testatoris nec propria*, and a *devastavit* (a), the plaintiff may immediately sue out a *fiery facias de bonis propriis* (b), or an *elegit* (c), or a *capias ad satisfaciendum* (d), against the property or person of the executor or administrator, in as full a manner as in an action against him in his own right (e). You cannot, however, sue out these writs of execution against the property or person of the executor or administrator, upon a judgment *de bonis testatoris* (which is the only one here intended), unless the sheriff have returned a *devastavit*. Therefore, if the sheriff return *nulla bona* merely, the plaintiff, if he can prove a *devastavit*, may either proceed by action of debt upon the judgment, suggesting a *devastavit*; or he may sue out a *scire fieri* enquiry (f), commanding the sheriff that, in case there shall be no goods of the testator remaining in the hands of the executor, he shall summon a jury to inquire if the defendant have wasted the goods of the testator; and if a *devastavit* be found (g), that he shall warn the defendant that he be

(u) *Id.*; Rast. Ent. 323; 8 Co. 134; 2 Saund. 226.

(v) *De Tastet v. Andrade*, 1 Chit. Rep. 629, 630, n.; Williams on Exec. 1222; *Butt v. Deschamps*, Tidd, 980.

(x) *Howard v. Jemmett*, 3 Bur. 1368, 1 W. Bla. 400, S. C.

(y) *Dearne v. Grimp*, 2 Bla. Rep. 1275; *Marshall v. Wilder*, 9 B. & C. 655.

(z) See the form, Chit. Forms, 615.

(a) See the form of such returns, Chit. Forms, 616; and of entry thereof

upon the roll, with award of *fi. fa.* or *ca. sa.*, *Id.*

(b) Doct. Plac. 169; and see form, Chit. Forms, 617.

(c) 1 Crompt. 346; 3 Bl. Com. 414.

(d) 2 H. 6, c. 12; Bro. Executors, 12. See the form, Chit. Forms, 617.

(e) See Rast. 323 b, 326 a, pl. 6.

(f) See form, Chit. Forms, 618.

(g) See form of return and inquisition, Chit. Forms, 620.



in court upon a day mentioned, to shew cause why the plaintiff should not have a *feri facias de bonis propriis* against him (*h*). The same notice must be given of executing a *scire fieri* enquiry, as in the case of a common writ of enquiry (*i*). Formerly as no costs were recoverable in this proceeding by *scire fieri* enquiry, unless the executor appeared and pleaded to it, it was seldom adopted; but the usual remedy was by action of debt on the judgment, suggesting a *devastavit*, as above mentioned (*k*). But now, since by the 3 & 4 W. 4, c. 42, s. 34, such costs are recoverable whether the executor appear and plead to the *scire facias* or not, the remedy by *scire facias* may become more usual. See more particularly as to these two modes of proceeding, and what shall be evidence of a *devastavit*, 2 Saund. 219, (n. 8).

If an executor or administrator plead a plea which is false within his own knowledge, (as a plea of judgment recovered against himself, or *ne unques executor or administrator*, or the like,) and the judgment against him be unconditionally *de bonis propriis*, the execution, pursuing the terms of the judgment, may be, it seems, in the first instance, unconditionally *de bonis propriis*. (See ante, 664, 666.) If an executor or administrator is charged and made liable as assignee, the execution would be against him *de bonis propriis*. (Ante, 666.)

The usual writ of execution against an executor for costs on a judgment for the debt *de bonis testatoris*, is a *fi. fa. de bonis testatoris si, &c. et si non, &c. de bonis propriis*, or on a return of *nulla bona n̄c testatoris nec propria*, then a *ca. sa.* may be issued (*l*). The execution for the debt and costs is usually included in one writ.

*Other Proceedings by or against Executors, &c.]* The proceedings upon a writ of error by or against executors, will be found under the title "*Error*," in the first volume. As to *scire facias* to revive a judgment against an executor or administrator, see ante, p. 601 to 604; and as to *scire facias* upon a judgment of assets *quando, &c.*, see ante, p. 608 (*m*).

(*h*) See 1 Saund. 219, (n. 8), 303; *Morfoot v. Chivers*, 1 Str. 631, 2 Ld. Raym. 1395, S. C.; *Ward v. Thomas*, 6 Leg. Obs. 156.

(*i*) *Biron v. Philips*, 1 Str. 235; *Stead*

*v. Lateward*, Id. 623, 2 Ld. Raym. 1382, S. C.

(*k*) 2 Saund. 219 a.

(*l*) See the forms, Chit. Forms, 615.

(*m*) See the form, Chit. Forms, 617.

## CHAPTER VI.

## ACTIONS AGAINST AN HEIR OR DEVISEE ON THE BOND, &amp;c. OF ANCESTOR.

## SECT. 1.

*Actions against Heirs.*

AN heir is compellable to pay the judgment and specialty debts of his ancestor, and is also liable for any breaches of contract of his ancestor under seal, in which the heir is named, to the extent of the assets which have come to him by descent. As to what are to be considered assets by descent, see 2 Saund. 8 d, &c. Even if he alien the property which has descended to him, before action brought, he is still liable to the extent of the value of the property so descended (a). The debt is also so far considered the debt of the heir, that he is sued in the *debet* and *detinet*, and not in the *detinet* only, though the omission of the *debet* would be aided by verdict (b).

*Process, &c.*] If there be no devisee, the action is against the heir only. If there be a devisee and heir, the action is against them jointly (c). If there be no heir, then the action is against the devisee only (d). There is no occasion to describe the defendant as heir or devisee in the process. (*Ante*, Vol. 1, p. 101.) The defendant cannot be holden to bail. (*See* Vol. 1, p. 73.)

As to the declaration, see 2 Saund. 7 d. 2 Chit. Pl. 5 ed. 468. It is filed or delivered, as in ordinary cases. (*See* Vol. 1, 191.)

*Plea, &c.*] Formerly if the defendant were under age at the time of the action, instead of pleading, he might pray that the parol might demur until he should be of full age. But now by the 1 W. 4, c. 47, s. 10, the parol is prohibited demurring, and consequently the defendant must plead.

Besides the defences which the ancestor might have set up to the action, the defendant may plead that he is not heir; or that he has

(a) 1 W. 4, c. 47, s. 6, which act repeals the 3 & 4 W. & M. c. 14; 6 & 7 W. 3, c. 14, and 47 G. 3, c. 74. The 3 & 4 W. 4, c. 104, renders the real estate, of whatever nature, of every person, whether a trader or not, liable to the payment of their simple contract

debts.

(b) Com. Dig. Pleader, 2 E. 2; *Hope v. Bague*, 3 East, 2.

(c) 1 W. 4, c. 47, s. 3; 2 Saund. 7, (n. 4).

(d) Id. s. 4; and see *Wilson v. Kimbley*, 7 East, 128, 133.

paid other bond or judgment creditors, to the full extent of the value of the lands descended, before the commencement of the action (e); or that he retains, in order to pay judgment debts; or that he retains, to pay his own bond or judgment debt; or that he has nothing by descent; or that he has nothing by descent excepting a reversion expectant on the life of another, in which case the plaintiff may take judgment of assets *quando acciderint* (f), and afterwards proceed by *scire facias* when the estate has come into possession, as directed *ante*, p. 608; but if the reversion were expectant on an estate for years, the defendant should confess assets in possession to the amount of the value of the reversion (g). The defendant cannot plead that there is an executor, who has assets; for the obligee may, at his election, sue either the heir or executor (h). Neither can he plead that he has laid out money beyond the amount of the rents in the repairs of the premises descended (i). The plea of *riens per descent*, and most other pleas by an heir, we have seen (*Vol. 1, p. 207*), must be delivered to the plaintiff's attorney, and not filed with the clerk of the papers; nor need they be signed by counsel.

If the defendant do not plead *riens per descent*, or some plea denying the plaintiff's cause of action, he must confess the action, and shew the certainty of the assets (k), for by the common law, if issue be taken on the quantity of assets, and it be found that the heir has other lands by descent (l), or if the defendant plead a fact which he knows to be false, and it be found against him (as, when he pleads *riens per descent*, and it is found that he has received something, however small or insufficient, to discharge the debt) (m), the plaintiff, (if he have not replied and taken issue according to the statute 1 W. 4, c. 47, s. 7) (n), will be entitled to a general judgment and execution at common law for the debt, damages and costs against the defendant, in the same manner as if it were for his own debt. And the law is the same, where the heir pleads payment by a co-obligor (o), or pleads a bad plea (p). But in such cases, if the plea be honest and fair, and the defect arise merely from mispleading, the Court will allow the defendant to amend it (q). The plea of *non est factum*, however, is an exception to the above rule; for if it be found false, still the judgment shall be of the lands descended only (r).

If the defendant plead *riens per descent* at the time of the writ brought, the plaintiff may by statute reply that the defendant had lands, &c. from his ancestor before the writ brought; and if issue be thereon joined, and found for the plaintiff, the jury shall then enquire.

(e) *Buckley v. Nightingale*, 1 Str. 665.

(f) Dy. 373 b; *Smith v. Angell*, 2 Ld. Raym. 784.

(g) 2 Saund. 7 c.

(h) Bro. Abr. Assets per Descent, 33; Plowd. 439 b; 1 P. Wms. 203.

(i) *Shetelworth v. Neville*, 1 T. R. 454.

(k) Plowd. 440; 2 Ro. Abr. 71; *Buckley v. Nightingale*, 1 Str. 665.

(l) *Smith v. Angel*, 7 Mod. 44.

(m) *Davy v. Pepps*, Plowd. 440; 2 Leon. 11; 2 Ro. Abr. 70, C. pl. 2.

(n) *Brown v. Shuker*, 10 Law Jour. 82, 2 C. & J. 311, S. C.

(o) *Brandin v. Milbank*, Carth. 93, Comb. 162, S. C.

(p) *Smith v. Angell*, 2 Ld. Raym. 783, 1 Salk. 354, S. C.

(q) 2 Saund. 72 b.

(r) *Clothworthy v. Clothworthy*, Cro. Car. 437. *Sed quare*, if it be an exception to the rule, for such plea is not false within the defendant's own knowledge.

of the value of the lands, &c. so descended, and the plaintiff shall have judgment of them. (1 W. 4, c. 47, s. 7). In which case the execution must, both for the debt and costs, be confined to the value of the lands descended (s). But if the plaintiff have judgment by confession (without confessing the assets), or on demurrer or *nil dicit*, it shall be for the debt and damages, without any enquiry of the value of the lands descended (t). Or, instead of replying in this manner, the plaintiff may take issue on the plea of *riens per descent*, and if he have a verdict, he may have a general judgment and execution at common law, as above mentioned (u).

The issue is made up, and the subsequent proceedings to judgment are the same as in ordinary cases. On an issue as to the value of the lands, the jury should of course find such value (x).

*Judgment.*] If the defendant have pleaded *non est factum*, or have confessed the action and shewn with certainty the assets descended, the judgment is special, that the plaintiff recover his debt, damages and costs, to be levied of the lands descended (y); but if he have pleaded *riens per descent*, and the plaintiff have taken issue thereon at common law, and it be found against defendant; or judgment be given against defendant on demurrer, or by default, *nil dicit*, or by confession (without shewing the assets in certain), or upon any other matter or ground whatsoever, the judgment may be general, in the same manner as if the action had been brought against the defendant for his own debt (z); or it may be special, as above mentioned, at the option of the plaintiff, if he think it more advantageous than the general judgment (a). Also, if the plaintiff shew that the heir has already received profits from the estate to the amount of the debt, and the defendant do not deny it, he may have a general judgment, and execution presently (b).

If the heir have aliened the lands previously to the suing out of the writ, he is expressly rendered liable for the specialty debts of his ancestor, to the amount of the lands aliened, by stat. 1 W. 4, c. 47, s. 6. If in such a case he plead *riens per descent* at the time of the writ brought, and the plaintiff reply assets before the writ brought, the jury shall find the value of the lands, and the plaintiff can have judgment and execution for debt and costs only to that extent, (1 W. 4, c. 47, s. 7), and not a general judgment against the heir, as at common law (c); or the plaintiff, instead of replying according to the statute, may take issue on the plea of *riens per descent*, and, if found for him, may have judgment either general or special, as before mentioned (d).

(s) *Brown v. Shuker*, 10 Law Jour. 82, 2 C. & J. 311, S. C.

(t) *Id.*; and see *Redshaw v. Hesther*, Carth. 354, Comb. 344, S. C.; 2 Saund. 8 a; and see the form of the replication, *Id.*

(u) *Mathews v. Lee*, Barnes, 444.

(x) *Brown v. Shuker*, 1 C. & J. 583.

(y) 2 Saund. 7 a, c, (n); see the form, Chit. Forms, 621.

(z) 2 Saund. 7 ab, (n); *Brown v. Shuker*, 10 Law Jour. 82, 2 C. & J. 311, S. C.

(a) 2 Saund. 7 c.

(b) Dy. 344 b.

(c) *Brown v. Shuker*, 2 C. & J. 311, 10 Law Jour. 82, S. C.; *Redshaw v. Hesther*, Carth. 354; 2 Saund. 8, (n).

(d) *Mathews v. Lee*, Barnes, 444; 2 Saund. 8 a.

But although the defendant have not aliened the lands, the plaintiff may, if he wish, reply according to the statute, and have judgment accordingly (e); though indeed this would be an indiscreet mode of proceeding, if the value of the lands would not amount to the debt and costs.

*Execution.*] We have just seen that the judgment for plaintiff is general or special. If it be general, the plaintiff may sue out a *fiery facias*, *elegit*, or *ca. sa.*, as in ordinary cases, and as if the action were against the defendant in his own right (f). But if the judgment be special, that the debt be levied of the lands descended, and be not on a verdict upon which the jury (as they must have done) have already found the value of the lands descended, the plaintiff in such a case must sue out a special writ, in nature of an extent, commanding the sheriff to inquire by a jury of the lands descended, and to deliver them to the plaintiff, to hold until the debt, &c. be thereof fully levied (g). It seems, also, that the plaintiff, upon a general judgment, may have this special writ, if he prefer it to the general writs of execution, upon suggesting that the heir has particular lands by descent, and praying execution of the whole of them (h).

*Scire facias on judgment against the ancestor, &c.*] What has now been stated has, of course, reference only to actions against the heir; if the action were against the ancestor, and the judgment revived by *scire facias* against the heir and terretenants, the execution is by *elegit*. (See Vol. 1, p. 402.) And it should be observed, that on a judgment against the ancestor, a moiety only of his freehold can be taken against the heir (i). As to *scire facias* to revive a judgment against an heir and terretenants, see *ante*, p. 602; and as to *scire facias* on a judgment of assets *quando*, &c. see *ante*, p. 608.

## SECT. 2.

### Actions against Devisees.

An action is maintainable against a devisee, and is proceeded in in the same manner and under the same circumstances, as an action against an heir. (See 1 W. 4, c. 47, s. 3, 4, 8.)

The recent act, 1 W. 4, c. 47, s. 2, renders wills in fraud of creditors void.

(e) Saund. 8, (n).

(f) See the form, Chit. Forms, 621.

(g) See the form, Chit. Forms, 623.

(h) W. Jon. 87; 2 Ro. Abr. 71, 72, D pl. 3.

(i) Dyer, 271 a; 3 Bac. Abr. 25.

## CHAPTER VII.

## ACTIONS BY AND AGAINST INFANTS.

## SECT. 1.

*Actions by Infants.*

*Process.*] THE process is to be sued out in the name of the infant, and not at the suit of the *prochein amy* or guardian. It is the same as in ordinary cases. It may be sued out before any *prochein amy* or guardian is appointed (*a*).

*Prochein amy, &c.*] An infant cannot prosecute an action either in person or by attorney; and therefore it is that he cannot sue as an informer on a penal statute (*b*), for an informer must exhibit his suit in proper person, and prosecute it either in person or by attorney. 18 *El. c. 5*. But he may sue either by *prochein amy*, (*stat. Westm. 1, c. 48; Westm. 2, c. 15*), or by guardian (*c*); usually the former. If he sue by attorney, although this cannot now be assigned as error, (21 *J. 1, c. 13, s. 2; 4 & 5 A. c. 16, s. 2*); yet the defendant may plead it in abatement (*d*); or if he sue in person, perhaps it would be error. There is one exception, however, to this, namely, where several executors are plaintiffs, and one of them is an infant; in such a case, all the plaintiffs may sue by attorney, and those who are of age may appoint the attorney for themselves and for the infant (*e*).

So, in ejectment, if the lessor or plaintiff be an infant, the defendant, after pleading, may move to stay proceedings, until a guardian be appointed for the infant, in order to answer costs (*f*), provided the plaintiff be not a real and substantial person (*g*).

If an infant sue by guardian, the guardian, it seems, must have a warrant; if by *prochein amy*, a warrant is unnecessary; but both guardian and *prochein amy* must be admitted by the Court, before the plaintiff can proceed in the action (*h*). *Let the person intended as*

(a) See Chit. Forms, 624.

(b) *Anon.* Say. 51.

(c) 2 Inst. 261.

(d) 2 Saund. 213, (n. 5).

(e) 1 Ro. Abr. 288, pl. 3; *Rutland v. Rutland*, Cro. El. 378; 2 Saund. 213, (n. 6).

(f) *Noke v. Windham*, 1 Str. 694;

*Throgmorton v. Smith*, 2 Stra. 932; *Thrustout v. Percival*, Barnes, 193; and see *Maddam d. Baker v. White*, 2 T. R. 159. See a form, Chit. Forms, 458.

(g) *Anon.* 1 Cowp. 128.

(h) F. N. B. 63 J.; 2 Inst. 261; *Young v. Young*, Cro. Car. 86.

*prochein amy* or guardian (being some friend of the infant, who is willing to prosecute the action for him) (i), attend with the infant before a Judge at chambers, who will accordingly grant his fiat for the clerk of the rules to draw up the rule (j); pay the Judge's clerk 12s. Draw up the rule with the clerk of the rules; pay 5s. (k). Annex a copy of it to your declaration before you deliver it. The admission may be general, to prosecute all actions, &c. for the infant; or special, to prosecute a particular action: if it be special, it will only authorize the particular action specified in it (l). (*R. H. 2 W. 4, r. 2*). If the *prochein amy* or guardian and infant cannot attend, write out a petition to be signed by the infant, praying to be admitted to prosecute, &c. by A. B. (m); and at the foot of it write a consent, to be signed by the *prochein amy*, &c. (n); and lastly, make an affidavit of the signing of the petition and consent on plain paper (o). Let these be presented to the Judge at chambers, who will thereupon grant his fiat, and you proceed to draw up the rule, &c. as is above directed.

The infant cannot afterwards remove his guardian, nor can he disavow the action of his *prochein amy* (p); but he may have a writ out of Chancery to remove him, or (which is more usual) he may make an application to this Court for that purpose (q). If the guardian or *prochein amy* be removed pending the suit, an entry thereof, it seems, should be made upon the roll (r).

The guardian, who appears to be such on record, is in general liable to the payment of the attorney's bill, though he did not interfere in the conduct of the action, nor was in any way interested in the event (s).

*Declaration, &c.*] In the commencement of the declaration it is stated, that the plaintiff is an infant, and that he sues by A. B., who is admitted by the Court to prosecute for him as his next friend, &c. (t). If it do not state that the *prochein amy* is admitted by the Court, it is error (u); but if it be stated in the declaration, the want of an entry of it on the roll will not be error (x), and the Court, if in fact there be such an admission, will allow it to be entered on the record at any time (y). The declaration in other respects is the same, and is delivered or filed as in ordinary cases. A copy of the rule of admission is delivered with it, as above directed; for until the rule be served, the defendant is not compellable to plead (z).

(i) The infant's father is usually appointed; but the Court, on motion, or perhaps a Judge at chambers, will appoint some other person to be the infant's guardian, with the concurrence of the father. *Claridge v. Crauford*, 1 D. & R. 13.

(j) See the form, Chit. Forms, 625.

(k) See form of rule, Chit. Forms, 625.

(l) See *Archer v. Frowde*, 1 Str. 304.

(m) See form, Chit. Forms, 624.

(n) See form, Chit. Forms, 624.

(o) See form, Chit. Forms, 625.

(p) F. N. B. 63 K.

(q) F. N. B. 63 K; Cro. Car. 161.

(r) *Davies v. Locket*, 4 Taunt. 765.

(s) *Murnell v. Pickmore*, 2 Esp. 473.

(t) See the form, Chit. Forms, 627.

(u) *Combers v. Watton*, 1 Lev. 224. See *Bird v. Pegg*, 5 B. & Ald. 418.

(x) 4 Co. 53 b; *Id.* 54 a; *Swift v. Nott*, 1 Sid. 173.

(y) *Young v. Young*, Cro. Car. 86; *Hutton*, 92; *Combers v. Watton*, 1 Lev. 224.

(z) 2 Sellon, 66.

By the 1 *W. 4, c. 47, s. 10*, the parol can no longer, as formerly, demur in actions by or against infants. (*Ante*, 669.)

The other proceedings in the cause are the same as in ordinary cases.

The guardian (*a*), or *prochein amy* (*b*), cannot be a witness. It has been held, in an action for slander, by an infant suing by guardian, that declarations made by the guardian on the subject are not admissible in evidence against the defendant (*c*).

If the defendant wish to know the place of residence of the *prochein amy* or guardian, he may oblige the plaintiff to give him notice of it, by application to the Court, or to a Judge at chambers, for that purpose (*d*); and if the *prochein amy* or guardian be not a responsible person, the Court would probably order the appointment of some other in his stead (*e*), and this was ordered in a late case before a Judge at chambers; but they will not make the infant give security for costs on that account (*f*).

*Costs.*] If the defendant be entitled to costs, he may proceed for them by attachment against the *prochein amy* or guardian (*g*); or, it seems, he may sue out execution, even a *ca. sa.*, against the infant himself, whether he have sued by *prochein amy*, &c. (*h*), or not (*i*).

## SECT. 2.

### Actions against Infants.

*Process, &c.*] An infant should not be holden to bail for any debt or other matter, where the plea of infancy would be a legal bar to the action. If holden to bail, however, the Court, it should seem, would not discharge him on entering a common appearance, but would put him to plead his infancy (*k*).

An infant may be outlawed, if above the age of twelve years (*l*); or even under that age, if a female.

The declaration is the same, and is filed or delivered in the same manner as in other cases.

*Appearance, plea, &c.*] An infant can appear and defend by guardian only, and not in person or by attorney (*m*). If he appear by at-

(a) *Clutterbuck v. Lord Huntingtower*, 1 Str. 506.

(b) *Hopkins v. Neal*, 2 Id. 1026.

(c) *Cowling v. Bly*, 2 Stark. 366.

(d) *Tomin v. Brookes*, 1 Wils. 246.

(e) See *Turner v. Turner*, 2 Str. 708.

(f) *Yarworth v. Mitchell*, 2 D. & R. 423; *Anon.* 1 Marsh. 4; 2 Chit. Rep. 359.

(g) *James v. Hatfield*, 1 Str. 548;

*Slaughter v. Talbot*, Barnes, 128; Ca. Pr. C. B. 32.

(h) *Gardiner v. Holt*, 2 Str. 1217.

(i) *Finlay v. Jowle*, 13 East, 6.

(k) *Madox v. Eden*, 1 B. & P. 490; Vol. 1, p. 73.

(l) Co. Lit. 128 a.

(m) Co. Lit. 135 b; *Frescobaldi v. Kingston*, 2 Str. 784.



torney, (excepting in ejectment) (*o*), and judgment be given against him, it is error; (*Vol. 1, 370*) (*p*); and the same, where several defendants appear by attorney, and one of them is an infant (*q*), even although they be sued as executors (*r*). But where judgment is given for the infant, it cannot be reversed for error on the ground of his having appeared by attorney (*s*).

If the defendant appear by attorney, and the plaintiff happen to know that he is an infant, the Court upon application, or perhaps a Judge on summons, will order the appearance to be set aside, and that the defendant appear by guardian (*t*). And this, it seems, may be done at any time before judgment (*u*). Before making the application, however, the plaintiff had better request defendant to name a guardian and appear by him (*x*). A common appearance cannot be entered for the defendant by the plaintiff (*y*); and therefore, when the defendant in non-bailable actions neglects to enter an appearance, a Judge, upon application and without summons, will make an order "that unless the infant appear within six days after personal service of the order, the plaintiff may assign John Doe for his guardian, and enter a common appearance for the defendant;" and upon affidavit of the service of this order, and shewing the original, the Judge will make the order absolute. An admission is then drawn up, &c. and a common appearance entered as in ordinary cases (*z*).

The guardian (usually his father (*a*), or else some friend of the infant, willing to defend the action for him,) is appointed in the same manner as is mentioned in the last section (*b*). *As to the removal of the guardian, see ante, 674.* If the admission be special, it will only authorize the defence of the particular action specified in it. (*R. H. 2 W. 4, r. 2*).

If an attorney have undertaken to appear for an infant, he must appear for him by guardian (*c*). (*See Vol. 1, p. 35*). As to the guardian's liability to the attorney for costs, *see ante, 674*.

If the defendant intends availing himself of his infancy as a defence, he had in general better plead it specially in bar. It may, however, be given in evidence under the plea of *non assumpsit*, in an action of *assumpsit* (*d*), or under the plea of *nil debet* in debt on sim-

(*o*) *Goodright v. Wright*, 1 Str. 83.

(*p*) 1 Ro. Abr. 287, pl. 1, 2, 747, pl. 13; 8 Co. 58 b; 9 Co. 30 b.

(*q*) *Bird v. Orms*, Cro. Jac. 289; *King v. Marlborough*, Id. 303; 1 Ro. Abr. 776, pl. 9; *Cour v. Lowther*, 1 Ld. Raym. 600.

(*r*) *Frescobaldi v. Kynaston*, 2 Str. 783.

(*s*) *Bird v. Pegg*, 5 B. & Ald. 418. See Lil. Ent. 555, &c.; 2 Ld. Raym. 1476; 1 Wils. 85.

(*t*) *Hindmarsh v. Chandler*, 7 Taunt. 488, 1 Moore, 250, S. C.; *Gladman v. Bateman*, Barnes, 418. And see *Boys v. Edmeads*, 2 Chit. Rep. 22; *Paget v. Thompson*, 3 Bingh. 609.

(*u*) See *Shipman v. Stevens*, 2 Wils. 50; *Kerry v. Cade*, Barnes, 413.

(*x*) *Shipman v. Stevens*, 2 Wils. 50.

(*y*) Tidd, 9th ed. 99.

(*z*) 2 Sellon, 68. See *Stone v. Atwood*, 2 Str. 1076.

(*a*) See *ante*, 674 n. (i); *Claridge v. Crawford*, 1 D. & R. 13.

(*b*) See the form of the petition, Chit. Forms, 626; and of the guardian's consent thereto, Id.; of the affidavit of signing the same, Id. 625; of the Judge's fiat and rule, Id. 626.

(*c*) *Power v. Jones*, 1 Str. 445; *Stratton v. Burgis*, Id. 114.

(*d*) *Madox v. Eden*, 1 B. & P. 481 a; 1 Chit. Pl. 516, 5th ed. 511, 516.

ple contract. But in debt on a specialty (e), or in covenant (f), it must be pleaded specially. We have seen (*ante*, p. 669), that by the 1 W. 4, c. 47, s. 10, that in an action by or against an infant on the bond of his ancestor, he can no longer as formerly pray that the parol may demur until he shall be of age. Even before this statute, if judgment were given that the parol demur, and error were brought on that judgment, the defendant could not plead his nonage in the court of error, and again pray the parol to demur (g). In an action against several persons, the defence of infancy, being personal, should be pleaded separately (h). Infancy may be pleaded with *non assumpsit* or *nil debet*, or, generally speaking, with any other plea (i). After setting aside a regular judgment, the Court have allowed defendant to plead infancy (k). The plea does not require counsel's signature; (*Vol.* 1, 207); and it is within the recent rule of Court of T. T. 1 W. 4, *ante*, *Vol.* 1, 208, as to rules to plead double. Before you deliver or file the plea, annex a copy of the rule for the admission of the guardian to it (l).

Whether the plaintiff declares on a joint contract against two defendants, and one of them pleads infancy, the plaintiff cannot enter a *nolle prosequi* as to him, and proceed against the other defendant in that action, but should commence a fresh action against the adult only (m). Where the defendant in *assumpsit* pleads infancy to a declaration, consisting of several counts or demands, the plaintiff may reply as to part of his demand, that it was for necessities; to other part that the defendant was of full age at the time of the contract; and to the other part that he confirmed it after he came of age.

The other proceedings are the same as in ordinary cases.

The payment of money into Court on a plea of infancy, is not an admission of the plaintiff's right of action beyond the sum paid in (n).

*Costs.*] An infant defendant is liable for costs, although a guardian have been appointed (o).

*Execution, &c.*] The infant may be arrested on a *ca. sa.* (*Vol.* 1, 408). The execution in this and other respects is the same as in ordinary cases.

Upon error brought by or against an infant, he should have a *prochein amy* or guardian appointed, as above directed.

As to warrants of attorney by infants, see *ante*, 497.

(e) *Darby v. Boucher*, 1 Salk. 279.  
*Zouch v. Parsons*, 3 Bur. 1805; 1 Chit. Pl. 519, 5th ed.

(f) 1 Chit. Pl. 523, 5th ed.

(g) *Aland v. Mason*, 2 Str. 861.

(h) 1 Chit. Pl. 598, 5th ed.

(i) See Tidd, 9th ed. 656.

(k) *Delafield v. Tanner*, 5 Taunt. 356, 1 Marsh. 391, S. C.

(l) See the form of the plea, Chit. Forms, 112.

(m) *Chandler v. Parkes*, 3 Esp. Rep. 76; *Jaffray v. Frebain*, 5 Id. 47; *Noko v. Ingham*, 1 Wils. 89.

(n) *Hitchcock v. Tyson*, 2 Esp. 482, n; *post*, Book 4, Part 1, Chap. 9.

(o) *Gardiner v. Holt*, 2 Str. 1217; Dy. 104.

## CHAP. VIII

## ACTIONS BY AND AGAINST BARON AND FEME.

## SECT. 1.

*Actions by Baron and Feme.*

THERE are but few peculiarities in actions by husband and wife and these have been already incidentally noticed in the course of the work. In general, wherever the cause of action would survive to the wife, she and her husband ought to be joined in the action (*a*). Where, however, the cause of action arises during coverture, the husband is frequently allowed to bring the action in his own name, or in the joint names of himself and his wife (*b*). If a wife sue alone, the defendant may plead the coverture in abatement; or the coverture may be assigned by the husband for error, upon a writ of error *coram nobis* (*c*). And if she marry after writ, and before plea, her coverture must be pleaded in abatement, and cannot be given in evidence under the general issue (*d*). If she marry after plea, the coverture should be pleaded *puis darrein continuance* (*e*). If she sue alone, without having any legal interest whatever, she would be nonsuited (*f*). If she sue jointly with her husband, when she ought not to have done so, the defendant may demur (*g*), or arrest the judgment (*h*), or bring error (*i*), if the defect appear on the pleadings, or, it should seem, nonsuit the plaintiffs at the trial if it do not. If the husband sue alone, when the wife ought to be joined, the defendant may demur, move in arrest of judgment, or bring error if the defect appear on the pleadings (*k*), or nonsuit the plaintiff if it does not (*l*).

Where a wife, living separate from her husband under a deed of

(*a*) *Dunstan v. Burwell*, 1 Wils. 224; *Swithin v. Vincent*, 2 Id. 227; 1 Chit. Pl. 5th ed. 31, 83. See form of affidavit to hold to bail by feme, in an action brought by baron and feme, Chit. Forms, 20.

(*b*) Id.

(*c*) *Milner v. Milnes*, 3 T. R. 631; *ante*, Vol. 1, 329, 370.

(*d*) *Morgan v. Painter*, 6 T. R. 265; 1 Chit. Pl. 5th ed. 37.

(*e*) Tidd, 9th ed. 849.

(*f*) *Candell v. Shaw*, 4 T. R. 361; 1 Chit. Pl. 37.

(*g*) *Buckley v. Collier*, 1 Salk. 114; *Rose v. Bowler*, 1 H. Bla. 108.

(*h*) *Abbott v. Blifield*, Cro. Jac. 644.

(*i*) *Bidgood v. Way*, 2 Bla. Rep. 1236.

(*k*) *Aleberry v. Walby*, 1 Str. 229; Cro. Jac. 644.

(*l*) *Anon.* 1 Salk. 282; *Rumsey v. George*, 1 M. & Sel. 280.

separation, brought an action as executrix in the joint names of her husband and herself, and the husband released the debt: the defendant having pleaded this release *puis darrein continuance*, the Court ordered the plea to be taken off the record, and the release to be given up to be cancelled (*m*).

The proceedings to judgment are the same as in other cases.

As to *scire facias* upon the death of a feme covert plaintiff, or upon the marriage of feme sole plaintiff, *see ante*, 605; and as to warrants of attorney given to a feme sole, who marries before judgment, *see ante*, 496.

In a late case, where in an action by husband and wife they were nonsuited, and she was taken in execution for the costs, the Court ordered her to be discharged out of custody, unless in a given time the defendant would shew that she had some separate property (*n*).

## SECT. 2.

### *Actions against Baron and Feme.*

In bringing actions against husband and wife, the general rule is, that whenever the cause of action would survive against the wife, they ought to be sued jointly (*o*). Care should be taken not to bring an action against a feme covert, without making the baron also a party; otherwise she may plead her coverture in abatement or bar, according to circumstances; or the coverture may be assigned by the husband for error (*p*), upon a writ of error *coram nobis*. (*See Vol. 1, 327, 370*). This is the only course to be adopted where the feme covert is sued alone, and you cannot nonsuit the plaintiff at the trial (*q*). But if the action be brought against her on her supposed contract during coverture, you may plead the coverture in bar, or give it in evidence under the general issue, or *non est factum* (*r*). If the action be brought against a woman while sole, and she marry pending the suit, the suit will not be abated, and you may proceed to execution without noticing the husband (*s*). If the husband be improperly sued alone, or the husband and wife be improperly joined, you may, if the defect appear on the pleadings, demur, move in ar-

(*m*) *Innell v. Newman*, 4 B. & Ald. 419.

(*n*) *Hoad v. Matthews*, MS. K. B. April 24, 1833, 6 Leg. Obs. 220, S. C.; and *see Sparkes v. Bell*, 8 B. & C. 1, 2 M. & R. 124, S. C.; Vol. I, 393; *post*, 680.

(*o*) *Dunstan v. Burwell*, 1 Wils. 224; *Swithin v. Vincent*, 2 Wils. 227; 1 Chit.

Pl. 5th ed. 66, n.

(*p*) See form, Chit. Forms, 248.

(*q*) *Milner v. Milnes*, 3 T. R. 631.

(*r*) *James v. Foukes*, 12 Mod. 101; *Linch v. Hooke*, 1 Salk. 7; 1 Chit. Pl. 5th ed. 68.

(*s*) *King v. Jones*, 2 Str. 811; *Cooper v. Hutchinson*, 4 East, 521; *post*, 681.

rest of judgment, or bring error (*t*): if it do not so appear, you may nonsuit the plaintiff at the trial.

*Process, &c.*] In what cases a feme covert may be arrested upon process against her solely, or against her and her baron jointly, see Vol. 1, 71. In an action against husband and wife, when the husband alone has been arrested, special bail may justify for him only, on his entering a common appearance for his wife (*u*). Where husband and wife were arrested, and the wife discharged out of custody upon entering a common appearance, and the plaintiff then declared against the husband alone: it was holden irregular (*x*). As to the service of non-bailable process upon baron and feme, see Vol. 1, 450. In an action against the husband and wife, the husband may be outlawed and the wife waived (*y*).

If a feme covert be sued alone, she must appear in person; for she cannot appoint an attorney (*z*). But if the husband and wife be sued jointly, they may appear by attorney; for the husband is capable of appointing an attorney for both (*a*).

The other proceedings to judgment are the same as in ordinary cases.

As to a writ of error by feme covert, see Vol. 1, 327, 329, 368, 370; and as to the abatement of a writ of error, by the marriage of a feme sole, plaintiff or defendant, see Vol. 1, 334. As to *scire facias* upon the marriage of a feme sole, defendant, see *ante*, 605. And as to warrants of attorney by a feme covert, or by a feme sole who marries before judgment, see *ante*, 495, 496, 497.

*Execution.*] As to the cases in which property belonging to the wife may or may not be taken in execution for the debt of the husband, see Vol. 1, 393.

If a *ca. sa.* be sued out against husband and wife, the wife may be taken on it, and the Court will not discharge her (*b*); unless, perhaps, where she has no separate property out of which the demand can be satisfied, or there appears to be collusion between the husband and the plaintiff to keep her in custody (*c*); the general rule being, that the wife shall be discharged, if in custody, before execution, but not after it (*d*). Also, if the husband die before execution, and the action survive against the wife, she may be taken in execution, in the same

(*t*) *Mitchinson v. Hewson*, 7 *T. R.* 348.

(*u*) *Coulson v. Scott*, 1 *Chit. Rep.* 75.

(*v*) *Cattarne v. Player*, 3 *D. & R.* 247.

(*y*) See *Tidd's Supplement*, 63, and practice there stated, citing *Smith v. Ashe*, *Cro. Car.* 58; *Bac. Abr. Outlawry*, C. 3.

(*z*) *Co. Lit.* 135; *Oulds v. Sanson*, 3 *Taunt.* 261.

(*a*) 2 *Saund.* 213; Vol. 1, 33.

(*b*) *Roberts v. Andrews*, 3 *Wils.* 124, 2

*W. Bl.* 720, S. C.; *Finch v. Duddin*, 2 *Str.* 1237; *Langstaff v. Rain*, 1 *Wils.* 149; *Berriman v. Gilman*, *Barnes*, 203; *ante*, Vol. 1, 408.

(*c*) *Sparkes v. Bell*, 8 *B. & C.* 1, 2 *M. & R.* 124, S. C.; *Hoad v. Matthews*, *ante*, 679, n. (*n*); *Pitts v. Meller*, 2 *Str.* 1167; see *Anon. Cro. Car.* 513; *Jackson v. Gabree*, 1 *Vent.* 51, *semb. cont.*

(*d*) *Roberts v. Andrews*, 3 *Wils.* 124, 2 *W. Bl.* 720, S. C.

manner as if the action were originally brought against her alone as a feme sole (e).

If an action be brought against a feme sole, and pending it she marry, it seems she may be taken on a *ca. sa.*, and the Court will not discharge her (f). The more regular mode of proceedings, however, in such a case is, to sue out a *scire facias*, in order to make the husband a party, and then to sue out execution against both. Moreover, in a *feri facias* against the wife who married pending the action, it is irregular to take the goods of the husband (g)

(e) 1 Ro. Abr. 890; 2 Bac. Abr. Execution, G. 4.

(f) *Doyley v. White*, Cro. Jac. 323; *Cooper v. Hunchin*, 4 East, 521; *King v.*

*Jones*, 2 Str. 811.

(g) *Doe d. Taggart v. Butcher*, 3 M. & Sel. 557, 559.

## CHAPTER IX.

## ACTIONS BY AND AGAINST BANKRUPTS OR THEIR ASSIGNEES.

## SECT. 1.

*Actions by Bankrupts or their Assignees.*

FOR any debt due to the bankrupt, and for injuries to his property, previous to his bankruptcy (*a*), the action must of course be commenced in the names of his assignees, that is, the official assignee and the assignees chosen by the creditors. But if the bankrupt at the time of his bankruptcy had no beneficial interest in the contract or property injured, as if he had assigned all his interest in the contract or property to a third person, then the action should be in the bankrupt's name (*b*). The consent of the creditors is not necessary to enable the assignees to bring such action (*c*). All the assignees should sue, otherwise the defendant may plead in abatement, or nonsuit the plaintiff (*d*) in actions *ex contractu*, though in actions *ex delicto* he could plead in abatement only (*e*). When one of several partners becomes bankrupt, the action must be in the name of the solvent partner and the assignees of the bankrupt (*f*); and, upon petition, the assignees may be authorized to use the name of the solvent partner without his consent, provided such partner, if no benefit be claimed by him by virtue of the proceedings, be indemnified against costs, and upon petition it may be ordered that he shall receive his share of the proceeds of the action (*g*). Before assignees have been appointed by the creditors, it should seem the official assignee may sue (*h*). When a new appointment of assignees has been ordered, the new assignees are to sue. (6 G. 4, c. 16, s. 66) (*i*). When an assignee dies, or a new assignee is chosen, the action will not be thereby abated; but the Court

(a) See *Hancock v. Caffyn*, 8 Bingh. 358; *Wright v. Fairfield*, 2 B. & Adol. 727; Arch. Bkt. L. 253.

(b) *Winch v. Keeley*, 1 T. R. 619; *Carpenter v. Marnell*, 3 B. & P. 40.

(c) *Bozon v. Williams*, 2 Y. & J. 475.

(d) *Snellgrove v. Hunt*, 2 Stark. 424, 1 Chit. Rep. 71, S. C.; *Aldrit v. Kittridge*, 6 Moore, 569; Arch. Bkt. L. 256.

(e) Arch. Pl. & Ev. 53, 54; Arch. Bkt. L. 256.

(f) *Thomason v. Frere*, 10 East, 418; *Eckhardt v. Wilson*, 8 T. R. 140; *Anon.* 12 Mod. 446.

(g) See 6 G. 4, c. 16, s. 89.

(h) See *Page v. Baner*, 4 B. & Ald. 345.

(i) See *Bloxam v. Hubbard*, 5 East, 407; 6 Moore, 569; *Snellgrove v. Hunt*, 1 Chit. Rep. 71; *De Cosson v. Vaughan*, 10 East, 61.

may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former; and the action may be prosecuted in the name of the said surviving or new assignee, in the same manner as if he had originally commenced it. Where an action has been commenced by the bankrupt before the bankruptcy, the defendant may defeat the action by pleading specially the bankruptcy, fiat and assignees' appointment, and if he does so plead it in proper time, the assignees will be compelled to proceed *de novo* in their own names (*k*). If they are thus allowed to continue the action already brought, they must proceed in the bankrupt's name to judgment; when, and not before, they can make themselves parties to the record, by *scire facias*, as mentioned *ante*, 606. So, if error be brought by or against a trader who afterwards becomes bankrupt pending the writ, the assignees must proceed in his name to judgment (*Ante*, Vol. 1, 334.) The assignees, however, should sue out a *scire facias* to revive the judgment, and make themselves parties to the record, before they sue out execution. (*Ante*, p. 606) (*l*). In a late case to an action of debt on an Irish judgment, the defendant pleaded that the judgment was entered up on a warrant of attorney given to the plaintiff to secure payment on a bond: that after the bond and warrant of attorney were given, and before the judgment was entered up, the plaintiff became bankrupt, and the debt in question was vested in his assignee, who had brought an action on the judgment before that commenced by the plaintiff, and that the same was still depending: it was held that the plaintiff was the person by whom the judgment ought to have been entered up, though after his bankruptcy; that in so doing, and in bringing the action, he might be considered as a trustee for the creditors; and the pendency of the other action, as here pleaded, was no defence (*m*).

*Process, &c.*] As to the affidavit to hold to bail by assignees of a bankrupt, see Vol. 1, 85 (*n*).

The process, &c. is the same as in ordinary cases. It need not, it seems, in this Court and in the Exchequer, describe the plaintiffs as assignees. (*Ante*, Vol. 1, 101, 102.)

*Declaration, &c.*] The declaration and other pleadings in the cause are filed or delivered as in ordinary cases (*o*).

In actions by assignees, no proof shall be required at the trial of the petitioning creditor's debt, and of the trading and act of bankruptcy,

(*k*) *Biggs v. Cox*, 4 B. & C. 920, 7 D. & R. 409, S. C.: *Kinnear v. Tarrant*, 15 East, 622. In the second edition of this work, a MS. case of *Smith v. Hivet*, T. T. 1821, is cited as having decided generally, that, if the action be already commenced by the bankrupt before his bankruptcy, the assignees in that case may either proceed in that action,

or commence a new one; but this, as a general position, is, according to the above cases, incorrect.

(*l*) See the form, Chit. Forms, 583.

(*m*) *Guinness v. Carroll*, 1 B. & Adol. 459.

(*n*) See the form, Chit. Forms, 20.

(*o*) See Arch. Bkt. L. 257. See the form, Chit. forms, 628.



unless the defendant, "at or before pleading," shall give notice to such assignee that he intends to dispute some and which of such matters. (6 G. 4, c. 16, s. 90) (p). This notice does not require personal service. Serving it on the attorney of the assignees, is sufficient; but a delivery of it to a maid servant at the house of the assignee is not (q). It has, however, been held sufficient that the notice was served on the clerk of the assignee at his counting-house (r). It must be served either at the time of pleading, or before it; if he plead, without giving the notice, he cannot afterwards, even before his time for pleading has expired, again plead with notice, until he have first obtained leave to withdraw his former plea (s). And where the clerk of the defendant's attorney delivered a plea of the general issue, but without notice to dispute the bankruptcy, and on the same day obtained back the plea under the pretence of correcting a mistake, and delivered another plea with the notice attached, it was held insufficient; the defendant ought to have moved to withdraw his plea (t). The Court sitting at Nisi Prius will not, it seems, enter into the question, whether the plaintiff's attorney has or has not undertaken to accept of notice after plea pleaded, if the fact is disputed (u). It is not considered as a part of defendant's case at the trial, but he may prove the service of it, as soon as the assignees attempt to make out a *prima facie* case, by producing the fiat, &c. (x). If the notice be of an intention to dispute the act of bankruptcy only, and depositions are read to prove the trading and petitioning creditor's debt, this does not put the whole file of proceedings in evidence; but if the opposite party wish to inspect other depositions, or have them read, he must call for them, as part of his case (y).

See as to the evidence necessary to support the action, Rosc. on Evidence; Phillips on Evidence; 1 & 2 W. 4, c. 56, s. 28, 29.

Where a separate commission of bankrupt was sued out, before the 1 & 2 W. 4, c. 57, came into operation, against A., and a joint commission against A. and B.; and the assignees of A. brought an action against C., and recovered: the Court ordered the money to be paid into Court, until a petition then pending before the Lord Chancellor, to supersede the separate commission, should be decided (z).

*Costs, &c.*] The costs are the same as in ordinary cases (a), excepting that by 6 G. 4, c. 16, s. 90, if the notice above mentioned be served, and the matters so disputed be proved or admitted at the trial, the Judge may, if he see fit, grant a certificate thereof; and the assignee shall thereupon be entitled to such costs (to be taxed) as were

(p) See the form, Chit. Forms, 628.

(q) *Howard v. Ramsbottom*, 3 Taunt. 526.

(r) *Widger v. Browning*, 2 C. & P. 523; 1 Mood. & M. 27.

(s) *Poole v. Bell*, 1 Stark. 328; *Radmore v. Gould*, 1 Wightwick, 80; *Gardner v. Slack*, 6 Moore, 489.

(t) *Lawrence v. Crowder*, 3 C. & P. 229, 1 M. & P. 511, S. C.; and see *Poole*

*v. Bell*, 1 Stark. 328.

(u) *Folks v. Scudder*, 3 C. & P. 232.

(r) *De Charme v. Waine*, 2 Camp. 324.

(y) *Black v. Thorn*, 4 Camp. 191.

(z) *Hodgkinson v. Travers*, 2 D. & R. 409, 1 B. & C. 257, S. C.

(a) See Arch. Bkt. L. 270; *Andrews v. Seagrave*, 8 Price, 212.

occasioned by such notice, to be added to his own costs if he succeed, or to be deducted from the costs, &c. of the other party, should he obtain a verdict (b). If a cause be referred by order of *Nisi Prius*, the Judge or Court cannot certify under this statute (c).

By 6 G. 4, c. 16, s. 44, in every action brought against any person for any thing done in pursuance of that act, if there be a verdict for the defendant, or if the plaintiff be nonsuit, or discontinue his action after appearance, or if upon demurrer judgment be given against the plaintiff, the defendant shall recover double costs (d). This provision does not apply to the case of assignees defendants, or those acting under them (e).

The judgment and execution are the same as in ordinary cases.

## SECT. 2.

### *Actions against Bankrupts or their Assignees.*

As to proceedings against members of parliament, subject to the bankrupt laws, see *ante*, 618. And as to the time limited for bringing actions against assignees, &c., see *Arch. Bkt. L.* 259, 11. And as to actions against the commissioners or messengers, see *Arch. Bkt. L.* 13.

Assignees cannot be sued as such at law; but they may be sued in their individual capacity for any cause of action arising to others from their acts, which they cannot justify under the fiat and their appointment. They cannot, however, be sued by action for the amount of dividends, the proper remedy is by petition (f). Where the bankrupt held his assignee to bail in an action for money had and received, instituted with a view to try the validity of the fiat, the Court discharged the assignee upon a common appearance (g).

*Process, &c.*] As in some cases in which a bankrupt can be holden to bail, and under some circumstances he is privileged from arrest, see *Vol. 1*, 70, 111. If bail have been put in for a defendant, and he afterwards become a bankrupt and obtain his certificate before the bail are fixed, the bail will be thereby discharged; and an *exoneretur* may be entered on the bail-piece, upon application to the Court in term, or to a Judge in vacation. (*Vol. 1*, 416, 417). And see, as to how far the bankruptcy of the defendant will discharge the sheriff or the bail below, *Vol. 1*, 136, 145, 148.

The declaration is filed or delivered, as in ordinary cases.

(b) See *Atkins v. Seaward*, 1 B. & B. 275, 3 Moore, 601, S. C.; *Ward v. Abrahams*, 1 B. & Ald. 367; *Arch. Bkt. L.* 270.

(c) *Barthrop v. Anderton*, 1 M. & Scott, 361, 8 Bingh. 268, S. C.

(d) See *Arch. Bkt. L.* 11.

VOL. II.

(e) *Worth v. Bubb*, 2 B. & Adol. 177, 1 Dowl. P. C. 328, S. C.

(f) *Arch. Bkt. L.* 214; 6 G. 4, c. 16, s. 111.

(g) *Chambers v. Bernasconi*, 4 M. & P. 218, 6 Bing. 498, S. C.

*Plea, &c.*] The general plea of bankruptcy need not be signed by counsel, and must be delivered to the plaintiff's attorney, and not filed. (*Vol.* 1, 207). But when the bankruptcy and certificate are pleaded specially, the plea must be signed by counsel, and filed with the clerk of the papers (*k*).

If one of several defendants plead bankruptcy, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others (*l*), whether the action be upon contract or in tort; upon which *nolle prosequi* the plaintiff will be liable to the costs of that defendant. (3 & 4 *W.* 4, c. 42, s. 32).

In actions against assignees, they may plead the general issue, and give the special matter in evidence. (6 *G.* 4, c. 16, s. 44) (*m*).

In actions against assignees, if the plaintiff intend to dispute the petitioning creditor's debt, the trading, or act of bankruptcy, he must "before issue joined" give notice to the defendants of his intention to dispute some and which of such matters; otherwise no proof shall be required at the trial of the facts above mentioned. (6 *G.* 4, c. 16, s. 90) (*n*). Service of this notice, at the time of delivering the issue, will not be sufficient (*o*); and the Court sitting at *Nisi Prius* will not enter into the question, whether the defendant's attorney has or has not undertaken to accept of notice after issue joined, if the fact be disputed (*p*). Other points as to this notice have been already noticed, *ante*, 684.

The issue is made up, and the other proceedings to judgment are the same as in ordinary cases.

As to the evidence and witnesses in actions against assignees, *see Arch. Bkt. L.* 259; *Roscoe on Evid.* 413 to 452.

*Proof of debt, how far a discontinuance of action, &c.*] By statute 6 *G.* 4, c. 16, s. 59, no creditor who has brought an action against a bankrupt for a debt proveable under the commission, shall prove a debt, or have any claim entered upon the proceedings under such commission, without relinquishing such action; and if the bankrupt shall be in prison or custody at the suit of or detained by such creditor, he shall not so prove or claim without giving a sufficient authority in writing for the discharge of such bankrupt; and the proving or claiming a debt under a commission by a creditor shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed; provided that such creditor shall not be liable to the payment to the bankrupt, or his assignees, of the costs of such action so relinquished by him; and that where a creditor shall have brought an action against such bankrupt, and another person, his relinquishing such action against the bankrupt shall not affect such action against such other person: provided also, that a creditor who has so elected to prove or claim, if the commission be afterwards superseded, may proceed in the action as if he had not so elected; and in ~~bankable~~ actions shall be at liberty

(*k*) See *Arch. Bkt. L.* 281, 282.

(*l*) *Noke v. Ingham*, 1 *Wils.* 89.

(*m*) *Arch. Bkt. L.* 234.

(*n*) See the form, *Chit. Forms*, 629.

(*o*) *Richmond v. Heapy*, 4 *Camp.* 207.

(*p*) *Folkes v. Scudder*, 3 *C. & P.* 232.

to arrest the defendant *de novo*, if he has not put in bail below or perfected bail above; or, if the defendant has put in bail or perfected such bail, to have recourse against such bail, by requiring the bail below to put in and perfect bail above within the first eight days in term, after notice, in the *London Gazette*, of the superseding such commission, and by suing the bail upon their recognizance, if the condition is broken (q).

There is no need of a formal discontinuance of the action before the plaintiff proves his debt, for the proof itself operates as a discontinuance of it (r). But the defendant is, it seems, entitled to have a suggestion of the fact of the plaintiff having proved entered upon the record; before which the action is not legally terminated, so as to render further proceedings in it by either party irregular (s). If a creditor, however, who has proved his debt, were afterwards to bring an action for it, or proceed in an action already brought, although his election could not be pleaded in bar, yet the Court, in which such action was brought, would, upon application, stay the proceedings in it, or an application might be made to the Court of Bankruptcy to expunge the proof (t); or if the bankrupt were in custody at the suit of the creditor, the Court of Bankruptcy, upon petition, would order him to be discharged, and probably make the creditor pay the costs (u). In strictness, perhaps, nothing but actual proof, or claim of the debt, ought to be deemed a relinquishment of an action already brought, or of the creditor's right to commence one (x); and, therefore, merely being assignee to the estate, unless the party be also a creditor, and have proved his debt, has been holden to be no election (y). Yet where a creditor, who had the bankrupt in custody upon mesne process, petitioned to be admitted to prove, and an order was made accordingly, the bankrupt was holden to be entitled to his discharge *instantly*, upon the making of the order (z); and lodging a detainer against a bankrupt in custody, and afterwards proving under the commission, will entitle the bankrupt to his discharge at the costs of the creditor (a). Even petitioning that the commission may be superseded, or, if found valid, that the party may be admitted to prove, or the like, will be deemed to be within the equity of the statute, so as to induce the Court, under circumstances, to injoin the creditor from proceeding at law (b), or to make him discharge the bankrupt out of custody before the petition can be entertained (c). If a creditor have two debts, perfectly distinct in their nature, or due in different rights, and he prove one of

(q) See the prior repealed act, 49 G. 3, c. 121, s. 14.

(r) *Adams v. Bridger*, 8 Bligh. 314, 1 M. & Scott, 438, S. C.; *Ex p. Woolley*, 1 Rose, 394; *Ex p. Glover*, 1 Glynn & J. 271; *Ex p. Frith*, 1 Id. 166.

(s) *Kemp v. Potter*, 6 Taunt. 549; Arch. Bkt. L. 110.

(t) *Harley v. Greenwood*, 5 B. & Ald. 95. As to bringing an action in a foreign country, see *Ex p. Cotterworth*, 1 Deac. & Chit. 281.

(u) Arch. Bkt. L. 110.

(x) Arch. Bkt. L. 111.

(y) *Ex p. Ward*, 1 Atk. 153.

(z) *Ex p. Irving*, Buck, 423.

(a) *Ex p. Cross*, 2 Glynn & J. 100.

(b) *Ex p. Bozannett*, 1 Rose, 181; *Ex p. Hardinburg*, Id. 204. And see *Ex p. Joseph*, Id. 184; *Ex p. Dickson*, Id. 93.

(c) See *Ex p. Blaydes*, 1 Glynn & J. 179; *Ex p. Lord*, 2 Rose, 422; Arch. Bkt. L. 111.

them, this will not prevent him from bringing an action against the bankrupt for the recovery of the other (*d*); and although the debt, upon which the action is brought, was due ~~and~~ provable at the time of proving the other debt (*e*), for the statute does not apply to actions for distinct demands brought subsequently to the proof or claim (*f*).

*Staying proceedings.*] Under the 6 G. 4, c. 16, s. 120, which authorizes the discharge of a certificated bankrupt taken in execution for a debt proveable under his commission, the Court has incidentally the power of staying, before judgment, proceedings against such a bankrupt for such a debt (*g*).

*Costs, judgment, and execution.*] As to costs, see ante, 684, 685. The judgment is the same as in ordinary cases.

As to a *ca. sa.* against a bankrupt, and his privilege from arrest, see Vol. 1, 409, 70, 116. As to a *fi. fa.* see Vol. 1, 394. And as to an *elegit*, it is clear that a judgment obtained even before the bankruptcy of a defendant cannot be executed after it, upon lands in his seisin at the time of the bankruptcy (*h*). But if he had sold the lands previously to his bankruptcy, and after the signing of the judgment, the plaintiff might still extend them under an *elegit* (*i*).

Formerly, if the defendant had been twice a bankrupt, and had not paid 15s. in the pound under his second commission; if the plaintiff knew of any effects or lands belonging to him, he might have seized them under a *fi. fa.* or *elegit*, and sold or extended them in satisfaction of his judgment. But by the 6 G. 4, c. 16, s. 127, if a person who has before been a bankrupt and has obtained his certificate, or has compounded with his creditors, or has been discharged by an insolvent act, becomes bankrupt, and obtains his certificate, unless his estate produces (after all charges) sufficient to pay every creditor under the commission 15s. in the pound, such certificate will only protect his person from arrest and imprisonment; but his future estate and effects (except his tools of trade, and necessary household furniture, and the wearing apparel of himself, his wife, and children,) will vest in the assignees under the commission, who will be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing of the commission (*k*). And this although the former commission have been superseded (*l*); or although all the former creditors did not come in under the deed of composition (*m*); or although the party taking advantage of this insufficiency

(*d*) *Watson v. Madox*, 1 B. & Ald. 121; *Harley v. Greenwood*, 5 Id. 95; *Dally v. Wolferton*, 3 D. & R. 271; *Ex p. Botterill*, 1 Atk. 109; *Ex p. Matthews*, 3 Atk. 817.

(*e*) *Bridget v. Mills*, 12 Moore, 92.

(*f*) *Ex p. Glover*, 1 Glynn & J. 271; *Ex p. Edwards*, 1 Mon. & M'A. 129; *Ex p. Sty*, 2 Glynn & J. 173; *Ex p. Edwards*, 1 Mon. & M'A. 116; *Ex p. Schlesinger*, 2 Glynn & J. 392.

(*g*) *Sudler v. Cleaver*, 7 Bingh. 769, 5 M. & P. 706, S. C.

(*h*) See Arch. Bkt. L. 157, 172; 1 P. Wms. 739.

(*i*) Tidd, 835.

(*k*) See *Ex p. Hodgkinson*, 19 Ves. 291. It seems this enactment extends to cases where the former bankruptcy and certificate were anterior to the statute, see *Robertson v. Score*, 3 B. & Adol. 338.

(*l*) *Thornton v. Dallas*, 1 Doug. 46 a.

(*m*) *Slaughter v. Cheyne*, 1 M. & Sel. 182.

of the second certificate had himself signed it (n). But a composition with a certain class of creditors, as for instance with joint creditors only (o), or a composition with all his creditors generally, if he have afterwards paid them 20s. in the pound before his bankruptcy (p), will not deprive a bankrupt of the benefit of his certificate. This section is similar to the repealed statute, 5 G. 2, c. 30, s. 9, except in the concluding words. By the repealed statute, the future estate of the bankrupt who obtained his certificate under circumstances mentioned in this section, but whose estate had not paid 15s. in the pound, was made liable to creditors in the same manner as before the passing of that act; but, by the present statute, all the future estate is *vested in the assignees* under the commission, and they take a present vested interest in such future property from the date of the assignment (q). And it has been held, *that*, as this section protects the person of the bankrupt, and vests the property in the assignees under the commission, no action will lie against the bankrupt for a debt due prior to his commission, although he had compounded with his creditors before he became bankrupt, and his estate had not paid 15s. in the pound under the commission (r). If the bankrupt has not obtained his certificate under the first commission, a certificate obtained under the second is absolutely void at law (s). A third commission against a bankrupt, whose effects have not paid 15s. in the pound, is also void (t).

If a bankrupt be in custody in execution, and obtain his certificate, he may be discharged upon application to any judge of the court wherein judgment was obtained. (6 G. 4, c. 16, s. 126) (u). For this purpose, *take out a summons before a judge, and after that (if not attended) a second summons; and upon producing the certificate, and an affidavit that the debt accrued before the bankruptcy, and that the certificate had been obtained without fraud, the judge will make an order for the defendant's discharge.* Also, before the bankrupt has obtained his certificate, a creditor at whose suit he is in custody shall not be allowed to prove his debt under the commission, until he have first given a sufficient authority in writing for the discharge of such bankrupt. (6 G. 4, c. 16, s. 59) (x).

(n) *Philpot v. Corden*, 5 T. R. 287.

(o) *Norton v. Shakespeare*, 15 East, 619.

(p) *Read v. Sowerby*, 3 M. & Sel. 78.

(q) *Es p. Robinson*, 1 Mon. & M'A. 44.

(r) *Eike v. Nookes*, 1 Mood. & Malk. 303; and see *Robertson v. Score*, 3 B. & Adolp. 338.

(s) *Till v. Wilson*, 1 M. & R. 580, 7 B. & C. 684, S. C.; *Fowler v. Coster*, 10

B. & C. 427; *Nelson v. Cherrill*, 8 Bingh. 316.

(t) *Fowler v. Coster*, 10 B. & C. 427.

(u) See Vol. 1, 409, and the cases there cited; and Arch. Bkt. L. 210, 211. It seems, that this section does not protect the goods of the bankrupt, see *Hanson v. Blakey*, 1 M. & P. 261, 4 Bingh. 493, S. C.

(x) See Arch. Bkt. L. 109, 231; *ante*, 686.

## CHAPTER X.

## ACTIONS BY AND AGAINST IDIOTS AND LUNATICS.

IDIOTS and lunatics may be holden to bail, and arrested, in the same manner, and under the same circumstances as other persons; and the court will not discharge them out of custody on account of their insanity (a), even although the fact of their insanity have been established by a commission of lunacy previously to the arrest (b). (*Vol. 1, 73*). Nor will the Court allow an *exoneretur* to be entered on the bail-piece, merely on account of the insanity of the principal; (*Vol. 1, 428*) (c); but the bail must render him in their discharge. (*Vol. 1, 419*).

An idiot plaintiff must appear in person, and then any one who prays to be admitted as his friend, may sue for him (d); if defendant, he must also appear in person, and any one who can make a better defence shall be allowed to defend for him (e).

A lunatic sues and defends in the same manner as other persons: if of age, either in person or by attorney; if under age, he must sue by *prochein amy* or guardian, and defend by guardian, as mentioned *ante*, p. 673, 676.

(a) *Nutt v. Verney*, 4 T. R. 121; *Ker-*  
*not v. Norman*, 2 Id. 390.

(b) *Steel v. Alan*, 2 B. & P. 362.

(c) *Ibbotson v. Lord Galloway*, 6 T. R.

133.

(d) 4 Co. 124. See Co. Lit. 135, and  
Vol. 1, 33.

(e) Id.

## CHAPTER XI.

## ACTIONS AGAINST JUSTICES OF PEACE, CONSTABLES, &amp;c.

*Limitation of action.*] ACTIONS against justices of peace (*a*) for any thing done by them in the execution of their office (*b*), or against constables, headboroughs, or other persons acting by their orders or in their aid, must be commenced within six calendar months after the cause of action has accrued. (24 G. 2, c. 44, s. 8; 7 & 8 G. 4, c. 29, s. 75; 7 & 8 G. 4, c. 30, s. 41) (*c*). The six months are to be reckoned inclusive of the day of committing the act (*d*); for instance, if the imprisonment or cause of action begins or ends on the 14th of December, it is a sufficient commencement of the action if the writ issue on the 14th of June (*e*). If the writ upon which the plaintiff declares has not been sued out within the six months, proof must be given at the trial that it was regularly continued down from a writ sued out within that time (*f*).

Actions brought against officers of the customs, &c. for any thing done by them in the execution of their duty, shall be commenced within six lunar (*g*) months, (6 G. 4, c. 108, s. 97), and actions against officers of the excise, &c. within three calendar months (7 & 8 G. 4, c. 53, s. 115), after the cause of action has accrued (*h*).

*Notice of action, &c.*] Before an action can be commenced against a justice of peace (*i*) for any thing done by him in the execution of his duty (*k*), the attorney or agent for the plaintiff must, one calendar month at least (*l*) previously to his suing out any writ against any such justice, or causing him to be served with process, deliver to him a notice in writing of such intended writ, &c., or leave such notice at his usual place of abode; in which notice the cause of action shall be clearly and explicitly stated (*m*), and the name of such attorney or agent, and his place of abode, shall be indorsed thereon (*n*); and the attorney or agent shall be entitled to the fee of 20s. for preparing and serving such notice, and no more. The month begins with, and includes, the day on which the notice was served. (24 G. 2, c. 44, s. 1) (*o*).

(a) See fully, Burn's J., 26th ed., tit. "Justices—Constables."

(b) See cases cited in note (i), *infra*.

(c) See the statute, and cases cited in 3 Burn's J., 26th ed. 495, 1 *id.* 805.

(d) *Clarke v. Davey*, 4 Moore, 465.

(e) *Hardy v. Ryle*, 9 B. & C. 603.

(f) *Weston v. Fournier*, 14 East, 491. See the mode of entering and continuing the writ, *post*, 699.

(g) *Croker v. Mactavish*, 1 Bingham, 307.

(h) See *Saunders v. Saunders*, 2 East, 254; *Godin v. Ferris*, 2 H. Bl. 14.

(i) See the 24 G. 2, c. 44; and as to who is a justice within it, see *Jones v. Williams*, 3 B. & C. 762, 5 D. & R. 654, S. C.; *Morgan v. Palmer*, 2 B. & C. 729;

*Briggs v. Evelyn*, 2 H. Bl. 114; *Entick v. Carrington*, 2 Wils. 275; 3 Burn's J., 26th ed. 491.

(k) What acts entitle a justice to this notice, see 3 Burn's J., 26th ed. 491, and cases there collected; *Rosc.* 475; *Beechey v. Sides*, 9 B. & C. 809; *Parton v. Williams*, 3 B. & Ald. 330.

(l) See *Castle v. Burdett*, 3 T. R. 623.

(m) As to the form of such notice, see 3 Burn's J., 26th ed. 492, and cases there collected; *Rosc.* 476.

(n) As to the indorsement, &c., see 3 Burn's J., 26th ed. 494, 495.

(o) *Castle v. Burdett*, 3 T. R. 623. See the form of the notice, *Chit. Forms*, 630.



Before an action can be commenced against an officer of the excise or customs, or any person acting by his order or in his aid (*p*), for any thing done by him in the execution of his duty (*q*), the attorney or agent for the plaintiff must, one calendar month at least previously to his suing out any writ or process against such officer, deliver to him, or leave for him at his usual place of abode, a notice in writing, stating clearly and explicitly the cause of action (*r*), and the names and places of abode of the plaintiff and of the attorney or agent respectively, and the plaintiff shall not give evidence of any cause of action not contained in the notice. (6 *G. 4*, c. 108, s. 93, 94; 7 & 8 *G. 4*, c. 53, s. 114) (*s*).

Also, where an action is intended to be brought against a constable or other officer (*t*), or any person acting by his order or in his aid, for any thing done by him in obedience to a warrant under the hand and seal of a justice of peace (*u*), a demand in writing of the perusal and copy of such warrant, signed by the party demanding the same (or by his attorney) (*w*), must be made, or left at the usual place of abode of such constable or officer (*x*), by the plaintiff or his attorney or agent; and if the perusal and copy of the warrant be not granted within six days after being thus demanded (or before the action has been commenced) (*y*), the plaintiff may bring his action against the constable or other officer alone; but if such perusal and copy be granted, then if the plaintiff sue the constable, &c. without making the justice also a party, upon proof of the warrant at the trial, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in the justice who made the warrant. Or if the action be brought jointly against the justice and such constable, &c. then upon proof of the warrant the jury shall find a verdict for such constable; but if they find a verdict also against the justice, he shall pay to the plaintiff as well his costs in the action, as also such costs as the plaintiff may have been obliged to pay to the other defendant. (24 *G. 2*, c. 44, s. 6). It may be as well to mention that this relates to actions of trespass and case only (*z*), and not to assumpsit (*a*), replevin (*b*), or the like.

(*p*) See *Clements v. Keen*, 2 Smith, 220; *Irving v. Wilson*, 4 T. R. 485; *Greenway v. Hard*, 1d. 553; *Wallace v. Smith*, 5 East, 122; *Williams v. Burgess*, 3 Taunt. 127.

(*q*) See *Daniel v. Wilson*, 5 T. R. 1; *Rez v. Brady*, 1 B. & P. 187; *Norton v. Miller*, 2 Chit. Rep. 140; *Rosc.* 461.

(*r*) See note (*m*), *supra*.

(*s*) See note (*m*), *supra*. See the form of the notice, Chit. Forms, 631.

(*t*) See the statutes and cases in 1 Burn's J., 26th ed. 802; *Harper v. Carr*, 7 T. R. 270; *Bul. N. P.* 24; *Entick v. Carrington*, 2 Wils. 275.

(*u*) See 1 Burn's J., 26th ed. 804; *Sturch v. Clarke*, 4 B. & Adol. 113; *Price v. Messenger*, 2 B. & P. 158, 3 Esp.

96, S. C.; *Postlethwaite v. Gibson*, Id. 226; *Money v. Leach*, 3 Bur. 1742; *Milton v. Green*, 5 East, 233; *Coupey v. Henley*, 2 Esp. 542, n; *Anon.* 1 Str. 446; *Bell v. Oakley*, 2 M. & Sel. 259; *Theobald v. Crichtmore*, 1 B. & Ald. 227; *Parton v. Williams*, 3 Id. 330.

(*w*) 1 Burn's J., 26th ed. 805; *Jory v. Orchard*, 2 B. & P. 42. See the form, Chit. Forms, 631.

(*x*) See *Clarke v. Davey*, 1 Burn's J., 26th ed. 804.

(*y*) *Jones v. Vaughan*, 5 East, 445.

(*z*) *Lyons v. Golding*, 3 C. & P. 586.

(*a*) *Bul. N. P.* 24.

(*b*) *Fletcher v. Wilkins*, 6 East, 283; *Waterhouse v. Keene*, 4 B. & C. 211, 6 D. & R. 257, S. C.

*Declaration.*] The *venue* must be laid in the county in which the facts complained of were committed, in all actions of trespass or on the case against justices of peace, mayors or bailiffs of cities or towns corporate, headboroughs, portreves, constables, tithingmen, churchwardens, &c., or other persons acting in their aid or by their command (21 J. 1, c. 12, s. 5) (c), and in actions against officers of the customs (6 G. 4, c. 108, s. 97), or excise (7 & 8 G. 4, c. 53, s. 115), or persons acting in their aid, for any thing done in execution of their respective offices. And the same in actions against all other persons holding a public employment, civil or military, in or out of this kingdom, having thereby authority to commit to safe custody; or if the fact be committed out of the kingdom, the plaintiff may lay the matter as having been done at Westminster, or in the county in which the defendant shall then reside. (42 G. 3, c. 85, s. 6, and see 6 G. 4, c. 108, s. 97). The declaration is in other respects the same as in ordinary cases.

*Plea, and other proceedings, &c.*] In actions against justices of peace, constables, &c. officers of excise and customs, &c. and all other persons holding public employments, and having authority to commit to safe custody, as above mentioned, for any thing done by them in execution of their respective offices, the defendants are not bound to plead any matter of justification, &c. specially, but may give it in evidence under the *general issue*. (21 J. 1, c. 12, s. 5; 42 G. 3, c. 85, s. 6; 6 G. 4, c. 108, s. 97; 7 & 8 G. 4, c. 53, s. 115) (d). Where a person is not an officer within the meaning of these enactments, though he may have supposed he was so, he is not within the protection given by them (e).

Justices of peace (24 G. 2, c. 44, s. 2, 4; 7 & 8 G. 4, c. 29, s. 75; 7 & 8 G. 4, c. 30, s. 41) (f), and officers of the customs and excise (6 G. 4, c. 108, s. 95, 96; 7 & 8 G. 4, c. 53, s. 116, 117) may *tender amends* before action brought, and plead such tender together with the general issue or other plea, with the leave of the Court; or, if they have neglected to tender amends, or the tender be insufficient, they may pay money into Court (even after issue joined and notice of trial given) (g), and such proceedings are thereupon to be had as in ordinary cases (h).

The plaintiff is bound, by the statutes above mentioned, to prove at the trial the service of the notice, otherwise the defendant shall be entitled to a verdict; and he is restricted in his proof by this notice, in the same manner as he is by a bill of particulars (i).

(c) See *Holton v. Boldero*, cited *per cur.* 5 Bligh. 339.

(d) See 1 Burn's J., 26th ed. 806; 3 Id. 497, 498.

(e) *Copland v. Powell*, 8 Moore, 400, 1 Bligh. 369, S. C.; *Jones v. Williams*, 3 B. & C. 762, 5 D. & R. 654, S. C.

(f) See 3 Burn's J., 26th ed. 496.

(g) *Nestor v. Newcomb*, 3 B. & C. 159; and see *Devaynes v. Boys*, 7 Taunt. 33, 2 Marsh. 356, S. C.

(h) See *Canbourn v. Ball*, 2 W. Bl. 859; *Stringer v. Martyr*, 6 Esp. 134; 1 H. Bl. 344.

(i) See *Stringer v. Martyr*, 6 Esp. 134.

As to damages in actions against justices of peace (*k*), and in actions against officers of the excise or customs, see *Vol. 1*, 312.

If the plaintiff obtain a verdict, still, in actions against officers of the customs or excise, he shall not be entitled to costs, if the Judge certify that there was probable cause for the seizure, &c. (6 *G. 4*, c. 108, s. 92; 7 & 8 *G. 4*, c. 53, s. 119) (*l*). And in actions against justices of peace, he shall not be entitled to costs, unless it be stated in the declaration that the acts complained of were done maliciously, and without reasonable and probable cause; nor shall he be entitled to costs, if it be proved at the trial that he was guilty of the offence of which he was convicted, &c. and that he had undergone no greater punishment than was assigned by law for such offence. (43 *G. 3*, c. 141; 7 & 8 *G. 4*, c. 29, s. 75; 7 & 8 *G. 4*, c. 30, s. 41; *Vol. 1*, 312) (*m*). But if, in actions against justices, constables, &c. the Judge certify that the injury was wilfully and maliciously committed, it seems the plaintiff is entitled to double costs. (24 *G. 2*, c. 44, s. 7).

The defendant, if he have a verdict, or if the plaintiff be nonsuit or discontinue the action, is entitled to double costs, in actions against justices, constables, &c. (7 *J. 1*, c. 5; 21 *J. 1*, c. 12; and see 7 & 8 *G. 4*, c. 29, s. 75; 7 & 8 *G. 4*, c. 30, s. 41) (*n*); to treble costs in actions against officers of customs or excise; (6 *G. 4*, c. 108, s. 97; 7 & 8 *G. 4*, c. 53, s. 115); and to double costs, in actions against other persons holding public employment, civil or military, in or out of the kingdom, and having power to commit to safe custody. (42 *G. 3*, c. 85, s. 6). In order to entitle an officer to double or treble costs under these statutes, if it do not appear upon the face of the record that the action was brought against him as such officer, for something done by him in the execution of his duty, he must obtain a certificate to that effect from the Judge, at or after the trial (*o*). And it has been lately held that a certificate, that the defendant was churchwarden, and acted by virtue of his office, to entitle him to double costs under the statute 7 *Jac. 1*, c. 5, need not be granted immediately after the trial of the cause: and where the plaintiff is nonsuited, the judge before whom the cause was tried may, after an interval of four years, upon an affidavit that the defendant was within the provisions of the statute, grant a certificate to entitle him to double costs (*p*).

(*k*) See *Massey v. Johnson*, 12 East, 67.

(*l*) See *Laugher v. Brevitt*, 5 B. & Ald. 762, 1 D. & R. 417, S. C.

(*m*) See *Rogers v. Jones*, 3 B. & C. 409, 5 D. & R. 268, S. C.

(*n*) See 3 Burn's J., 26th ed. 497; *Blanchard v. Bramble*, 3 M. & Sel. 131; *Mackay v. Goodden*, 1 Dowl. P. C. 463.

(*o*) *Harper v. Carr*, 7 T. R. 448; *Grindley v. Holloway*, 1 Doug. 307, 308, n.; *Devenish v. Martins*, 2 Str. 974; *Johnson v. Stanton*, 2 B. & C. 621, 4 D. & R. 156, S. C.; and see *Atkins v. Banwell*, 3 East, 92.

(*p*) *Norman v. Danger*, 3 Younge & J. 203.

## CHAPTER XII.

## ACTIONS AGAINST CLERGYMEN.

As to the temporary privilege from arrest, which clergymen enjoy under particular circumstances, see Vol. 1, 115. The only other peculiarity in the mode of proceeding against clergymen is in the execution.

When the sheriff, to a common *feri facias*, returns *nulla bona*, and that the defendant is a beneficed clerk, not having any lay fee (*a*), the plaintiff may sue out a *feri facias de bonis ecclesiasticis*, directed to the bishop of the diocese, or to the archbishop, (during the vacancy of the bishop's see), commanding him to make of the ecclesiastical goods and chattels belonging to the defendant, within his diocese, the sum therein mentioned (*b*). It is tested and returnable, and must be sealed and indorsed, in the same manner as a common *feri facias*. (See Vol. 1, 378, 390, &c.) Take this writ to the registrar of the diocese, who will thereupon issue a sequestration (*c*) (which is in the nature of a warrant) directed to the churchwardens, requiring them to levy the debt of the tithes and other profits of the defendant's benefice. This sequestration must be published, by reading it in the parish church during divine service; and afterwards at the church door, and fixing a copy thereon, provided that be the usual mode of publication in the diocese where the sequestered benefice is situated (*d*); and as it seems the writ has priority only from the time of this publication (*e*), it should be done without delay. But the property is bound from the time when the sequestrator is appointed, and the publication is only necessary in order to give security against conflicting rights (*f*). Instead of directing this sequestration to the churchwardens, the plaintiff, upon giving security to the bishop, may have it directed to persons of his nomination (*g*).

If the entire debt be not levied in one diocese, the plaintiff, upon the return of the writ, may have a *testatum fl. fa. de bonis ecclesiasticis* into another diocese, for the residue (*h*); or he may have an *alias* into the same diocese.

Or, instead of a *feri facias de bonis ecclesiasticis*, the plaintiff may

(a) See *Pickard v. Pacton*, 1 Sid. 276; Dalt. 219; and see the form of this return, Chit. Forms, 277.

(b) See 2 Bac. Abr. Execution, G 6; *Watson v. Auberry*, 2 Mod. 256; and see the form of the writ, Chit. Forms, 632.

(c) See form, Tidd's Forms, 380.

(d) *Bennett v. Apperley*, 6 B. & C. 630.

(e) 1 Crompt. 359; Tidd, 1024.

(f) *Per Bayley, J., Bennett v. Apperley*, 6 B. & C. 630.

(g) 3 Burn, Eccl. Law, 317; Tidd, 1023.

(h) See the form, Chit. Forms, 633.

sue out a writ of *sequestrari facias*, directed, dated, and returnable, &c. as the *feri facias*, commanding the bishop to enter into the rectory and parish church, and to take and sequester the same, and hold them, until of the rents, tithes, and profits thereof, and of the other ecclesiastical goods of the defendant, he have levied the plaintiff's debt (i). This writ is in the nature of a *levari facias*; the writ above mentioned, in the nature of a *feri facias*.

If, to a special *capias ullagatum*, the sheriff returns an inquisition, finding that the defendant had benefices but no lay fee, the Court will award a writ of sequestration on reading the transcript of the outlawry and inquisition (k).

Either of these writs is a continuing execution, that is, continuing until all that has been commanded to be levied is levied; and if the sequestration issue before the writ is returnable, it is sufficient though it be not published till afterwards (l). And the plaintiff is entitled to the growing profits from time to time, though long after it is returnable, until he is satisfied the sum indorsed on the writ (m). If, however, it be actually returned, the bishop's authority is determined (n).

The defendant has no right to have the writ returned, though he may have a return of the amount of the profits received by the sequestrator (o).

The bishop, with reference to these writs, stands in the same situation precisely as the sheriff with reference to writs in ordinary cases, and may be ruled, and is bound to obey the orders of the Court as to their execution, &c., in the same manner as the sheriff (p).

(i) See the form, Chit. Forms, 633; and see *Marsh v. Fawcett*, 2 II. Bl. 582.

(k) *Rex v. Hind*, 1 Dowl. P. C. 286, 1 C. & J. 389, 1 Tyrw. 347, S. C.

(l) *Bennett v. Apperley*, 6 B. & C. 630. See *Colebrooke v. Layton*, 1 N. & M. 384.

(m) *Marsh v. Fawcett*, 2 H. Bla. 582.

(n) *Id.*

(o) *Hart v. Vellans*, 1 Dowl. P. C. 434.

(p) See *Rex v. Bishop of London*, 1 D. & R. 486; *Bennett v. Apperley*, 6 B. & C. 630, 9 D. & R. 673, S. C.

## CHAPTER XIII.

## ACTIONS BY PAUPERS.

*Who admitted to sue in formâ pauperis.*] Every poor person, who may have cause of action, shall have writs according to the nature of his case, without paying for the sealing or writing the same; and the justices shall assign him counsel and attorneys, who, together with the officers of the Court, shall act *gratis*. (11 II. 7, c. 12). The party applying must swear that he is not worth 5*l.* excepting his wearing apparel, and the matter in question in the cause (a). (*R. H. 3 & 4 J. 2, r. 1, a*). It is discretionary with the Court or chief justice to grant the indulgence of suing thus *in formâ pauperis*; they will not perhaps grant it, for instance, in an action for slander. It may be granted either at the commencement of the suit, or at any subsequent period of it; but if granted *pendente lite*, it has no retrospective effect (b). The privilege also extends only to the cause in which the admission has been granted (c). It is confined to plaintiffs, and cannot be granted to a defendant (d).

Though an order has been made for admitting a party to sue *in formâ pauperis*, yet if it appear that the plaintiff has no meritorious cause of action, the Court will discharge the order, though a Judge's order for that purpose must be made a rule of Court before the Court will entertain a motion to discharge it (e).

*How admitted.*] The party may be admitted, either upon motion in Court, (*see R. H. 3 & 4 J. 2, r. 1*), or (which is the mode usually adopted) upon petition to the chief justice (f). Write an affidavit to the effect above mentioned, on plain paper (f), and have it sworn by the pauper, before a judge or commissioner. Write out a petition also on plain paper, and signed by the pauper, stating the cause of action, and praying to be admitted to sue *in formâ pauperis*, and that counsel and an attorney (naming them) may be assigned to him (f); and at the foot of it, get counsel to subscribe his opinion shortly, that the plaintiff has good cause of action (f). Annex the affidavit to the petition; take them to the chief justice's chambers, and his clerk will thereupon make out the order (f); pay him 2*s.* 6*d.* If moved for in Court, annex the affidavit and opinion to the brief; and afterwards draw up the rule with the clerk of the rules. Take this rule or order to the different

(a) Lil. Pr. Reg. 633.

(b) See 1 M'Clel. &amp; Y. 282.

(c) Lil. Pr. Reg. 633; and see *Gibson v. M'Carty*, Hardw. 311.(d) *Anon.* Barnes, 328; 16 Vin. Abr.259, pl. 4; *Res v. Wright*, Hardw. 211, 253(e) *Hawes v. Johnson*, 1 Y. & J. 10.

(f) See the form, Chit. Forms, 635.

offices through which you pass the proceedings, in order to avoid any demand for fees; and annex a copy of it to the declaration, before you deliver or file it.

The proceedings in the cause are the same as in ordinary cases.

*Effect of the admission.*] After admission to sue *in formâ pauperis*, the plaintiff shall be at liberty to carry on all the proceedings without paying fees to the officers of the Court, or to his counsel or attorney. But if he afterwards have judgment in the action, the counsel, attorney, and officers are entitled to their fees, at least to such fees as shall be allowed by the master in taxing the costs; for although they perform their several duties for the pauper gratuitously, his adversary should not be allowed to derive any advantage or benefit from that circumstance.

A pauper is entitled to costs, in all cases in which a defendant must pay them; but in no case, (except perhaps where he omits to proceed to trial pursuant to notice, or an undertaking, (*infra*),) is he obliged to pay costs (*g*). By 23 H. 8, c. 15, s. 2, he shall not pay costs, but shall suffer such other punishment as the Court shall deem reasonable. The only punishment, however, which the Court ever inflict, and this only in cases where the pauper has been guilty of very gross laches or other misbehaviour (*h*), is to dispauper him; but, when thus dispaupered, he is not liable for costs previously incurred (*i*). But by a recent rule of Court, where a pauper omits to proceed to trial pursuant to notice or an undertaking, he may be called on by a rule to shew cause why he should not pay costs, though he has not been dispaupered. (*R. H. 2 W. 4, r. 110*). And the Court have stayed proceedings in a second action by a pauper, until the costs of a former nonsuit in an action for the same cause were paid (*k*); but there are instances in which they have refused even this (*l*). A plaintiff cannot be dispaupered after judgment as in case of a nonsuit (*m*). If a pauper be admitted to defend a suit in Chancery *in formâ pauperis*, his solicitor can only recover of him money actually paid out of pocket for the defence of the suit (*n*).

(*g*) *Rice v. Brown*, 1 B. & P. 39; *Blood v. Lee*, 3 Wils. 24.

(*h*) See *Winter v. Slow*, 2 Str. 878, 983; *Doe d. Leppingwell v. Trussell*, 6 East, 505; and see *Anon.* 2 Salk. 567; *Ansell v. Sloman*, 8 Mod. 344.

(*i*) *Fortesc.* 320; *Munford v. Pait*, 1

Sid. 261.

(*k*) *Weston v. Withers*, 2 T. R. 511.

(*l*) *Brittan v. Greenville*, 2 Str. 1121; *Winter v. Slow*, Id. 878; and see *Butler v. Inneys*, Id. 691; 3 Wils. 24.

(*m*) *Jenkins v. Hyde*, 6 M. & Sel. 228.

(*n*) *Philpe v. Baker*, 1 Car. & P. 533.

## BOOK IV.

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### PART I.

#### PROCEEDINGS INCIDENTAL AND COLLATERAL TO THE ACTION.

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### CHAPTER I.

#### ENTRY OF PROCESS ON ROLL TO SAVE THE STATUTE OF LIMITATIONS.

THE 2 W. 4, c. 39, s. 10, enacts, "that every writ of summons and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon, or served therewith; provided that no *first* writ shall be available to prevent the operation of any statute, whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration; and unless every writ issued in continuation of a preceding writ, shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ; such return to be made, in bailable process, by the sheriff or other officer to whom the writ shall be directed, or his successor in office; and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be." This enactment materially alters the former practice, under which it was not necessary to enter any continuances of the second or subsequent writs until the plaintiff replied to the plea of the statute of limitations (a).

(a) See *Harris v. Woolford*, 6 T. R. 617; *Doe Mears v. Dolman*, 7 Id. 618; *more v. Rattenbury*, 5 B. & Ald. 452, 1 D. & R. 27, S. C.  
*Gregory v. Hurrill*, 1 Bingh. 324; *Beard-*



## 700 *Entry of Process, to save a Statute of Limitations.*

And if the plaintiff declared within a year after suing out the first process (provided he had not been nonprossed before that time) continuances were not necessary, and even the first process need not have been returned or filed, though otherwise it must have been so (b). As to the mode of saving the statute in ejectment, see ante, 529 (c).

If you proceed by writ of summons, sue out the writ against the defendant as in ordinary cases, (ante, Vol. 1, 448), within the time limited for bringing the action. If the defendant has not been served therewith within four calendar months from its date inclusive, then you must, within a calendar month after the expiration (d) of the writ, inclusive of the day of such expiration, return on the writ "non est inventus (e)"; and within the same time get a roll, (Vol. 1, 222), and enter the writ and return thereon, with the award of an alias writ of summons (e). Make out a docket paper (f). Take the writ, roll, and docket paper to the clerk of the judgments and docket the entry, and he will mark the writ; pay him 2s. the entry, 3s. the docket. Then carry in the roll as directed, Vol. 1, 223, and file the writ with the custos brevium. After this, and within one calendar month after the expiration of the first writ of summons, inclusive of the day of such expiration, sue out an alias writ of summons against the defendant, as in ordinary cases (ante, Vol. 1, 451). Indorse on, or subscribe to this alias writ, a memorandum specifying the day of the date of the first writ (f). If the defendant has not been served with this alias writ within four calendar months from its date inclusive, then you must, within a calendar month after the expiration of the alias writ, inclusive of the day of such expiration, return on such writ "non est inventus;" and within the same time enter on the roll, containing the entry of the first writ, this alias writ and return thereon, together with the award of a pluries (g). Make out a docket paper (g). Take the alias writ and docket paper to the clerk of the judgments, and docket the entry, and he will mark the writ; pay him 2s. the entry, 3s. the docket. File the writ with the custos brevium. After this, and within one calendar month after the expiration of the alias writ of summons, inclusive of the day of such expiration, sue out a pluries writ of summons against the defendant, as in ordinary cases. (Ante, Vol. 1, 451). Indorse on or subscribe to this pluries writ a memorandum specifying the day of the date of the first writ (g). If the defendant has not been served with this pluries writ within four calendar months from its date inclusive, then you must, within a calendar month after the expiration of the pluries writ, inclusive of the day of such expiration, return on such writ "non est inventus," and within the same time enter on the roll containing the entry of the first writ this pluries writ and return thereon, together with the award of a pluries (h). Make out a docket paper (h).

(b) *Worley v. Lee*, 2 T. R. 112; *Penny v. Harvey*, 3 Id. 123; *Parsons v. King*, 7 Id. 6; *Stanway v. Perry*, 2 B. & P. 157.

(c) *Farrelain v. Shackleton*, 5 Bur. 2604.

(d) The writ expires in four calendar

months after its date, inclusive of such date.

(e) See form, Chit. Forms, 636.

(f) See form, Chit. Forms, 637.

(g) See form, Chit. Forms, 638.

(h) See form, Chit. Forms 639.

Take the pluries writ and docket paper to the clerk of the judgments, and docket the entry, and he will mark the writ; pay him 2s. the entry, 3s. the docket. File the pluries writ with the *custos breviarum*. After this, proceed by other pluries writs of summons, and get them issued, returned, and filed in the same manner, until the defendant has been served therewith, or until you have obtained his appearance under a writ of *distringas*, or have outlawed him. It should seem that the writ issued in the continuation of a preceding writ must not be issued until the preceding writ be returned and filed; for no writ can be continued unless it be first returned and filed, the Court until that time having no consueance of the action, so as to enable them to award an *alias*, &c. (i). Care must be taken that the writ upon which the defendant is ultimately brought before the Court, be of the same species with that originally sued out and entered on the roll, as above mentioned, and that the continuances correspond with both. If the first writ be a summons, all the continued writs issued must be also *alias* or *pluries* writs of summons, and not writs of *capias*, and so *vice versa* (k). We have seen (*Vol.* 1, 375) that continuances of *mesne* process, and of writs of execution, differ materially in this respect. The Court may, it seems, allow an amendment of the continuances entered (l), and also of the writ itself, if merely voidable and not void (m).

If you proceed by writ of *capias*, the same practical observations above made as to proceeding by writ of summons will be applicable, except as relates to the arresting instead of serving the defendant, and except that you take the writs of *capias* to the sheriff's office, and get him or his successor in office to return "*non est inventus*" (n).

(i) See *Welden v. Greg*, 1 Tidd, 60; *Vincent's case*, Comb. 346; *Attwood v. Burr*, 7 Mod. 5.

(k) *Smith v. Bower*, 3 T. R. 662; and see, as to what writs were formerly considered good continuances of the preceding one, *Beardmore v. Rattenbury*, 5 B. & Ald. 452, 1 D. & R. 27, S. C.; *Page v. Newman*, 8 B. & C. 489, 2 M. & R. 528, S. C.; *Plummer v. Woodburne*, 4 B. & C. 625, 7 D. & R. 25, S. C.; and cases there cited. In Mr. Tidd's little work, on the *Uniformity of Process Act*, p. 60, is a form of entry of a *distringas*, as if that writ was a mode of continuing a writ of summons; but

quære if the *distringas* can be deemed a writ to continue the writ of summons; and see words of the 10th sect. of the 2 W. 4, c. 39, ante, 699.

(l) See *Taylor v. Gregory*, 2 B. & Adol. 257.

(m) A writ returnable on a general return day, instead of a day certain, was formerly held sufficient to save the statute. *Leadbiter v. Markland*, 2 Bla. Rep. 1131; and see *Karner v. James*, Willes, 255; *Smith v. Bower*, 3 T. R. 662.

(n) See forms of entries, &c., of writs of *capias*, Chit. Forms, 639 to 641.

## CHAPTER II.

## OUTLAWRY.

- SECT. 1. *Upon Mesne Process*, 702 to 709.  
 2. *Upon Final Process*, 710.  
 3. *Reversal of Outlawry*, 710.

## SECT. 1.

*Outlawry upon Mesne Process.*

*What, and in what cases.*] OUTLAWRY is a punishment inflicted by law, for a contempt' in avoiding the execution of the process of the king's court: the party outlawed is to be imprisoned if he can be found; he forfeits to the king (*a*) his personal chattels presently, and his real chattels and the profits of his lands immediately upon office found; and he is incapacitated from suing in his own right, from serving on juries, &c. But, by outlawry in personal actions, the party does not forfeit any freehold lands, nor a rent-charge for life, nor for arrears which accrue for the rent during his life, nor are copyholds liable to be seized (*b*). Nor is his competency as a witness in a personal action destroyed (*c*). In civil actions, outlawry is rather in the nature of process to compel the defendant to submit to the jurisdiction of the Court: if outlawed upon mesne process, he may, upon putting in and perfecting bail, or entering an appearance, reverse the outlawry as of course; if upon final process, he may reverse the outlawry, upon payment of the debt and costs.

Where a defendant, therefore, keeps out of the way in order to avoid an arrest, outlawry is the proceeding usually adopted to bring him before the Court; and it is advisable, where it is intended to hold the defendant to bail, and he has property which can be taken under a special *capias utlagatum*. But in non-bailable actions, the proceeding by summons and *distringas*, mentioned *Vol.* 1, 456, is preferable, being much less expensive, and more expeditious.

Outlawry may be adopted against men above the age of twelve years (*d*), and against women of any age; in which latter case, the defendant is said to be "waived," not outlawed (*e*). In an action against husband and wife, the husband may be outlawed, and the wife waived (*f*).

*Writ and process.*] Formerly, the action must have been commenced by *original writ*, otherwise process of outlawry would not lie, either upon mesne or final process (*g*). But now, by the 2 *W.* 4, c. 39, the action must either be commenced by writ of *capias*, or

(*a*) See *Rea v. Cooke*, 1 M'Clel. & Y. 196.

(*b*) Com. Dig. Utlagary, D. 3.

(*c*) Co. Lit. 6. b.

(*d*) Co. Lit. 128. a.

(*e*) Id. 122. b.

(*f*) See Tidd's Supplement, 63, and cases and practice there noticed.

(*g*) *Crew v. Bails*, 1 Leon. 329. See *Edwards v. Carter*, 1 Str. 473; *Gent v. Abbott*, 8 Taunt. 187.

writ of summons and *distringas* thereon; and sect. 5 of that act enacts, "that, upon the return of *non est inventus* as to any defendant against whom such writ of *capias* shall have been issued, and also upon the return of *non est inventus* and *nulla bona* as to any defendant against whom such writ of *distringas*, as hereinbefore mentioned, shall have issued (whether such writ of *capias* or *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons), it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant by writs of *exigi facias*, and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of *non est inventus* to a *pluries* writ of *capias ad respondendum*, issued after an original writ. Provided always, that every such writ of exigent\* proclamation, and other writ subsequent to the writ of *capias* or *distringas*, shall be made returnable on a day certain in term; and every such first writ of exigent and proclamation shall bear *teste* on the day of the return of the writ of *capias* or *distringas*, whether such writ be returned in term or in vacation; and every subsequent writ of exigent and proclamation shall bear *teste* on the day of the return of the next preceding writ; and no such writ of *capias* or *distringas* shall be sufficient for the purpose of outlawry or waiver, if the same be returned within less than *fifteen days* after the delivery thereof to the sheriff, or other officer to whom the same shall be directed." Also, by section 6, of the same act, outlawry or waiver may be obtained on *final* process in an action commenced by *capias* or summons.

When you intend holding the defendant to bail, *prepare your affidavit of debt, and a præcipe for the officer, as in other cases. (Vol. 1, 109). Also, get a blank writ of capias, (which may be had at the stationer's, or elsewhere), and fill it up according to the form and directions, as mentioned ante, Vol. 1, 96 to 106. The capias must be directed to the sheriff of the county, in which you intend that the defendant shall be outlawed; and it is usual, when expedition is desirable, to outlaw the defendant in London, for he can be there exacted every fortnight, in other counties only every month. Take the affidavit, præcipe, and writ, to the signer of the writs, who will sign the writ; and the affidavit, if not already sworn, may be sworn before him at the same time; pay him 2s. 6d. for signing, and 1s. for the affidavit, if sworn before him. Leave the affidavit and præcipe with him. Take the writ to the seal office, and get it sealed; pay 7d. (R. M. 3 W. 4, r. 2). Indorse it with the four first mentioned indorsements, as directed ante, Vol. 1, 106 to 108. Take the writ to the sheriff's office, and leave it there fifteen days, at least, before you want him to return it; and, at the expiration of that time, get him to return it "*non est inventus*" (h). Then leave the writ and return with the filacer of the proper county, who (as he acts also as clerk of the exigents), will make out the *exigi facias* and writ of proclamations. It is not, it seems, absolutely re-*

\* Sic.

(h) See the forms applicable to these proceedings, Chit. Forms, 642, &c. Formerly, the return might be made

by the attorney; but it may be questionable whether he can do so under the present writ of *capias*; and see the end of the 10th section of 2 W. 4, c. 39.

quisite that the affidavit to hold to bail should be made and filed until the defendant have been arrested: it may be better, however, to make it at the time above mentioned. (*See post*, 707).

When you do not intend holding the defendant to bail, prepare and sue out a writ of summons, as in ordinary cases, and in the manner pointed out, *ante*, Vol. 1, 448. You must afterwards obtain an order of the Court, or a Judge, for a writ of *distringas*, as directed *ante*, Vol. 1, 458; and if leave to issue it be granted, issue it accordingly, in the form and according to the practice, as directed Vol. 1, 458. The *distringas* should be directed to the sheriff of the county in which you intend that the defendant should be outlawed. In London the defendant may be exacted every fortnight, in other counties every month. Take the writ of *distringas* to the sheriff's office, and leave it there fifteen days, at least, before the return day, and, at the expiration of that time get him to return it "*non est inventus and nulla bona.*" Then leave the writ and return with the filacer of the proper county, who (as he acts also as clerk of the exigents) will make out the *exigi facias*, and writ of proclamations.

*Exigi facias*, &c.] The *exigi facias* is a judicial writ, commanding the sheriff to demand the defendant from county court to county court until he be outlawed; or, if he appear, then to take and have him before the Court on a day certain in term, to answer to the plaintiff in an action of &c. (i). It must be tested on the day of the return of the *capias* or *distringas*, whether in term or vacation; it must be returnable in the same or the following term, on a day certain, and must have fifteen days at least between the teste and return; (2 *W. 4*, c. 39, s. 5); and, if possible, you should regulate the return day so that five hustings in London, or county courts elsewhere, may be held between the teste and return of the writ, in order to save the expense of an *allocatur exigent*; for the *exigent* shall have such a return as that five county courts may intervene between the teste and return (k). Get this writ signed by the filacer (who acts as clerk of the exigents), and sealed. If the defendant be imprisoned, or beyond sea, at the time of the *exigent* awarded, or after the teste, and before or at its return, the Court will reverse the outlawry (l). But the Court would not reverse the outlawry merely on the ground of the defendant having constantly appeared in public during the proceedings against him, unless, perhaps, he swore that he had had no notice of them (m).

The writ of proclamations recites the *exigi facias*, and requires the sheriff to make three proclamations, in pursuance of *stat. 31 El. c. 3* (n). It should be directed to the sheriff of the county where the defendant shall be actually dwelling at the time of the *exigent* awarded, (31 *El. c. 3*, s. 1), otherwise the Court will reverse the outlawry (o);

(i) See the form, Chit. Forms, 642, 127. and the notes there.

(k) Com. Dig. Pleader, 2 *W. 4*.

(l) *Post*, 710.

(m) *Johnson v. Driver*, 1 Dowl. P.C.

(n) See the form, Chit. Forms, 645.

(o) *Rayer v. Cooke*, 3 B. & C. 529, 5 D. & R. 302, S. C.

but in practice it is usual to direct it to the same sheriff the *exigi facias* and other writs were directed to; if directed to a different sheriff, it is called a writ of "*foreign proclamation*" (p). It must be tested and returnable the same as the *exigi facias*. (31 *El. c. 3, s. 1*; 2 *W. 4, c. 39, s. 5*). *Get it signed by the filacer, and sealed*. Unless this writ be regularly sued out and returned (q), according to the directions of the statute, the outlawry will be void, and may be reversed. (31 *El. c. 3, s. 1*) (r).

*Take these writs to the officers of the sheriffs, to whom they are directed, respectively, and they will be executed*. The *exigi facias* is executed, by exacting the defendant at five successive county courts, or in London at five successive hustings, unless before that time the defendant appear and put in bail, &c.; and the writ must be actually in the sheriff's possession at the time the defendant is demanded (s). The writ of *proclamations* is executed by making three proclamations: one in the county court or hustings; one at the general quarter sessions; and one other of these proclamations to be made one month at least before the *quinto exactus*, on a Sunday, immediately after divine service and sermon, at or near the usual door of the church or chapel of the town or parish where the defendant was dwelling at the time of the awarding of the exigent. (31 *El. c. 3, s. 1*). Where one month had not elapsed between the proclamation at the church door and the *quinto exactus*, the Court reversed the outlawry (t).

If you find by the sheriff's return (u) to the writ of *exigent*, that there have not been five county courts or hustings between the teste and return of it, *sue out with the filacer another writ, called an "allocatur exigent(x)," and leave it with the sheriff, as above directed, who will thereupon exact the defendant at the next and subsequent county courts or hustings, so as to make the number of county courts or hustings at which the defendant has been demanded upon both writs, five*. If upon this writ the defendant be not demanded the requisite number of times, you may sue out another writ of *allocatur exigent*, and have it executed in the same manner.

The defendant must be exacted upon these several writs, at successive county courts or hustings; for if any county court or husting have intervened, the several writs of *exigent*, &c. already executed, are without effect, and you must sue out an *exigi facias* and writ of proclamations *de novo* (y).

*Appearance, &c.*] If, before the return of the *exigent* the defendant wish to appear voluntarily, then, in non-bailable actions, *let him enter an appearance with the filacer of the term in which the exigent issued, as directed Vol. 1, 454 (z), who will thereupon make out a supersedeas; pay him 3s.; or you may make out the supersedeas yourself (a), upon*

(p) See the form, Chit. Forms, 645.

(q) See form of return, Chit. Forms, 644.

(r) See *Rex v. Yandell*, 4 T. R. 521; *Volet v. Waters*, 3 D. & R. 55; *Royer v. Cook*, 5 D. & R. 302, 3 B. & C. 529, S. C.

(s) *Volet v. Waters*, 3 D. & R. 55; *post*, 710.

(t) *Taylor v. Waters*, 3 D. & R. 575, 2 B. & C. 353, S. C.

(u) See the form, Chit. Forms, 644.

(x) See the form, Chit. Forms, 644.

(y) 2 Sellen, 205. See *Plowd. 371*; *Whitwick v. Howendon*, 3 Lev. 245.

(z) See form, Chit. Forms, 342.

(a) See the form, Chit. Forms, 646.

getting a note of particulars of the exigent from the filacer, and get him to sign it. Get it sealed; pay 7d. Leave it at the sheriff's office before the return of the exigent, and he will thereupon cease to execute the latter writ, and make a return to it accordingly (b); pay him 2s. 6d. The suing out of the *supersedeas* is, it seems, deemed equivalent to entering a common appearance, and therefore a common appearance is rarely actually entered in such a case (c). If, however, the action be bailable, the defendant must put in and perfect special bail (which is done as in ordinary cases, ante, Vol. 1, 151 to 180), before the filacer can issue the *supersedeas* (d).

If the defendant be arrested on the exigent, he must give bail to the sheriff, as in ordinary cases, or remain in custody.

But if the defendant be not arrested on the exigent, nor appear voluntarily, as above mentioned, then, after being exacted five times, and proclaimed thrice, he is outlawed. The writ of exigent is then returned, with the five exactions thereon stated with certainty as to time, place, &c. together with the judgment of outlawry by the coroner, or in London by the recorder (e). The writ of proclamations must also be returned. File the writ of proclamations with the *custos brevium*; and take the writ of exigent and return to the filacer, who (as clerk of the outlawries) will make out the *capias utlagatum*.

[*Capias utlagatum*, &c.] The *capias utlagatum* is general or special; the former against the person only, the latter against the person, lands, and goods. The general writ of *capias utlagatum* commands the sheriff to take the defendant, so that he have him before the Court on a day certain, (2 W. 4, c. 39, s. 5), to do and receive what the Court shall consider of him (f). Get this writ signed by the filacer (who acts as clerk of the exigents), and sealed. Both this and the special writ may issue into any county, at the option of the plaintiff, without being *testatum* writs (g).

When the defendant has been arrested on the *capias utlagatum*, if the action be non-bailable, the sheriff shall discharge him, upon an attorney's undertaking in writing to appear for the defendant and reverse the outlawry. (4 & 5 W. & M. c. 18, s. 4). Or, if the action be bailable, the sheriff shall discharge him, upon his giving a bond, with two sufficient sureties, for double the sum for which special bail is required, conditioned for his appearance by attorney at the return of the writ, or if given after the return, then for his appearance at some return in the following term, (*Id.* s. 5), to reverse the outlawry, and to do and perform such other things as shall be required by the said Court; (*Id.* s. 4); which "other things" include putting in bail to a new action (h), pleading within a limited time, putting the plaintiff as nearly as possible in the same condition he would otherwise

(b) See form of return, Chit. Forms, 647.

(c) See *Peach v. Wadland*, Barnes, 319.

(d) *Campbell v. Daley*, 3 Bur. 1920.

(e) See *Rex v. Almon*, 5 T. R. 202;

*Rex v. Yandell*, 4 Id. 521.

(f) See the form, Chit. Forms, 647; the like to a county palatine, *Id.*

(g) *Arton*. 1 Vent. 33; Gilb. C. B. 17.

(h) See *Graham v. Henry*, 1 B. & Ald. 131.

have been in, and the like. Or, the plaintiff may, if he will, instead of putting the defendant to reverse the outlawry, consent to his being discharged by *supersedeas*, upon his putting in and perfecting bail.

The sheriff is bound to take the bond above mentioned, in bailable actions, whether there be any sum indorsed on the *capias utlagatum* or not (i). The plaintiff, however, should, as soon as the defendant is arrested, make an affidavit of debt, and file it with the filacer if he have not already done so, (*see ante*, 703), and should give a memorandum or copy of it to the officer in whose custody the defendant is.

It has been held, that a bankrupt who has been outlawed, and his person arrested, and goods taken by the sheriff, under a *capias utlagatum*, is not entitled to be relieved, on summary motion, from such arrest and levy, except upon the terms of appearing to the action, and putting in and perfecting special bail, although the plaintiff had also proved her debt under the commission, and received a dividend, after which the action was commenced for the balance; for, until those terms are complied with, he has no *locus standi in judicio* (l). But, during the forty-two days allowed for the examination of the bankrupt under the 117th section of the 6 G. 4, c. 16, the bankrupt cannot be arrested under the *capias utlagatum*: and if he be, the Court of Bankruptcy will discharge him (m).

*Special capias utlagatum, &c.*] The *special capias utlagatum*, like the general writ, commands the sheriff to take the defendant; and thus far it is executed, and the defendant is discharged, upon an attorney's undertaking or upon giving a bond to the sheriff, in the same manner as when the writ is general. But the special writ also commands the sheriff to inquire, by a jury, of the defendant's goods and lands, to extend and appraise the same, and to take them into the king's hands and safely keep them, so that he may answer to the king for the value and issues of the same (n). *Get this writ signed by the filacer, and sealed.* As the inquiry and extent in this case, however, are merely to compel the appearance of the defendant; if he be arrested, and give the undertaking or bond above mentioned, before this part of the writ be executed, it would be a very harsh proceeding to inquire of and extend his property afterwards, and, I believe, is never done. But if he have not been arrested, or have not given the undertaking or bond above mentioned, or have not appeared or put in bail to the original action, the sheriff must summon a jury to inquire of the defendant's property, real and personal, in possession and in action, and to appraise the same; and you may subpoena witnesses before the inquest, to prove the defendant's interest in the property, and its value. As soon as the in-

(i) *Cracraft v. Gledose*, 3 Bur. 1482.  
(l) *Summervil v. Watkins*, 14 East, 536. It seems that bankruptcy and certificate are no ground of discharge of a prisoner in custody on a *capias utlagatum*; *Beauchamp v. Tomkins*, 3 Taunt. 141; but in *R. v. Castleman*, 4

Burr. 2119, 2127, the Court thought an outlaw relievable under an insolvent act.

(m) *Ex p. Hemsley*, Jan. 1832, Court of Review, 1 Deacon & Chit. Rep. 16.

(n) See the form, Cnit. Forms, 648.



quest is taken, the sheriff takes possession of the property found by it, and returns the *special capias utlagatum*, annexing thereto the inquisition (n). *Get the writ and return from the sheriff, and get it filed with the filacer, as clerk of the exigents (o), who will give you a transcript of it for the Exchequer.* As to the sheriff's right to poundage, upon executing this writ, see *Graham v. Grill*, 2 M. & Sel. 294; and as to a landlord's right to his rent, where goods, &c. are thus taken on a *capias utlagatum*, see *St. John's College v. Murcott*, 7 T. R. 259. The Court will not, on the 4 & 5 W. & M. c. 18, s. 4 & 5, restore goods taken on a *special capias utlagatum* (q).

If the defendant have not as yet appeared or put in bail, and there be no probability of his doing so, you may proceed to obtain satisfaction for your debt and costs out of the property thus seized. For this purpose, *take the transcript the filacer has given you to your clerk in court (r) in the Exchequer, who, after giving a rule for persons to come in and claim the property seized, will upon the expiration of that rule make out for you a venditioni exponas commanding the sheriff to sell the goods (s); a levari facias to levy the issues and profits of the freehold land (t), and a scire facias to recover debts due to the defendant (u), if necessary.* Take these writs (or such of them as you may think proper to sue out) to the sheriff, who will thereupon sell the goods, levy the issues, or summon the parties on the scire facias, as thereby directed. If to a *special capias utlagatum* the sheriff return an inquisition finding that the defendant had benefices, but, no lay fee, the Court will award a writ of sequestration on reading the transcript of the outlawry and inquisition (w).

When the goods have been sold, &c. if the amount do not exceed the sum of 50*l.* *move the Court of Exchequer that it be paid to you, and an order will be granted accordingly.* Your clerk in court will thereupon draw up the order (x), and also a subpoena requiring the sheriff to pay you the money (y); and the sheriff being served therewith, will pay you the amount mentioned in the return to the venditioni exponas, deducting his poundage.

But if the money in the sheriff's hands exceed the sum of 50*l.*, then petition (z) the lords of the treasury that it may be paid over to you, who will thereupon refer it to the solicitor of the treasury (a). *Get a certificate of the proceedings upon the outlawry from your clerk in court (b); make an affidavit of the debt and costs before a baron (c); and leave these, together with your attorney's bill, and the venditioni exponas and return, before the solicitor of the treasury, who will thereupon*

(n) See the form of the return and of the inquisition, Chit. Forms, 648, 649.

(o) *Reynolds v. Adams*, 3 T. R. 578.

(q) *Anon.* 1 Tidd, 133.

(r) In revenue business, and all matters connected with the king's revenue, or which involve revenue rights and questions, the sworn and side clerks have still the exclusive privilege of practice. Prac. Exch. 12.

(u) See a form, Chit. Forms, 649.

(t) See a form, Chit. Forms, 650.

(w) See Gilb. C. B. 16; *Alworth v. Hutchinson*, 1 Lutw. 330.

(x) *Rex v. Hind*, 1 Dowl. P. C. 286, 1 C. & J. 389, 1 Tyrw. 347, S. C.

(z) See a form, Chit. Forms, 654.

(y) See a form, Chit. Forms, 655.  
(z) See form, Chit. Forms, 651, 652.

(a) See form, Chit. Forms, 653.

(b) See form, Chit. Forms, 653.

(c) See a form, Chit. Forms, 654.

make his report (c). File this report with the clerk of the treasury; and a warrant will then be issued, directing the attorney-general to consent to an order (d); which being taken to the attorney-general, he will give his consent of course. Then move the court, and get the order and subpoena from your clerk in court, as above mentioned; and the sheriff, upon being served with the order, &c. will pay you the money. This proceeding usually costs from 20*l.* to 25*l.*

In the same manner, if your debt be considerable, and the chattel property not sufficient to satisfy it, you may obtain a lease or grant of the king's right to levy the issues of the defendant's freehold lands, by petition to the lords of the treasury (e). A warrant will thereupon be granted for the lease, and the lease be made out at the Pipe-office of the Court of Exchequer (f).

*Declaration after outlawry.*] If the defendant enter an appearance, or put in and perfect bail, before he is outlawed, as mentioned *ante*, 705, the plaintiff may declare against him as in ordinary cases, in actions by summons or *capias*, as the case may be. But if he be once outlawed, the process hitherto sued out against him is determined, and you cannot declare upon it (g). Upon reversing the outlawry, however, the defendant appears to a new action to be brought against him by the plaintiff for the same cause; and the plaintiff has until the end of the second term next after the reversal of the outlawry, to declare against him. (31 *El. c.* 3, s. 3). After that time, the defendant may refuse to receive a declaration; in which case his bail are discharged, and the plaintiff will be obliged to sue out new process against him. If the plaintiff declare in time, he is not obliged to lay his venue in the county into which the summons or *capias* issued; but may lay it in any other county, at his pleasure. (*R. II.* 2 *W.* 4, r. 40) (h).

Where there are two defendants, and one only has appeared or is in custody, then after proceeding to outlawry against the other, you may declare against the one who has appeared, alone, stating the outlawry of the other in the commencement of your declaration (i). In such declaration you must state that the co-defendant was outlawed in the particular suit; stating that he was "in due manner" outlawed would not suffice (j). There is no occasion to refer to the record of outlawry (k). The declaration must be intituled or appear on the face of it to have been filed or delivered some day subsequent to the outlawry (l).

(c) See a form, Tidd's Forms, 49.

(d) See a form, *Id.* 49.

(e) See form of petition, Chit. Forms, 651.

(f) 2 Sellon, 290 to 292.

(g) See *Hesse v. Wood*, 4 Taunt. 691.

(h) *Whitwick v. Hovenden*, 3 Lev. 245. See form of judgment of *nonpro* for not declaring after defendant's appearance on the *exigi facias*, Chit. Forms, 655.

(i) See form, Chit. Forms, 65; *Haigh v. Conway*, 15 East, 1; *Goldsmith v. Levy*, 4 Taunt. 299; *ante*, 639, and Vol. 1, 187; and see *Fort v. Oliver*, 1 M. & Sel. 242.

(j) *Saunderson v. Hudson*, 3 East, 144; *Haigh v. Conway*, 15 East, 1.

(k) *Macmichael v. Johnson*, 7 East, 50.

(l) See *Cole v. Abbott*, 8 Taunt. 187, 2 Moore, 87, S. C.

## SECT. 2.

*Outlawry upon final Process.*

If the action were commenced by writ of summons or *capias* (2 *W. t.*, c. 39, s. 6), then if *non est inventus* be returned to the *ca. sa.*, you may (without suing out an *alias* or *pluries ca. sa.*) sue out an *exigi facias* as directed *ante*, 704, and upon the return thereof sue out a *capias utlagatum*, general or special, as directed *ante*, 706, 707 (*m*). A writ of proclamations is not necessary.

If the defendant be arrested on the *capias utlagatum*, he must remain in custody until he have reversed the outlawry (*n*). If his property have been taken under a special *capias utlagatum*, you may proceed to get the produce of it paid over to you in satisfaction of your debt and costs, as directed *ante*, 708.

After error brought, you cannot proceed to outlaw the defendant on the judgment (*o*).

## SECT. 3.

*Reversal, &c. of Outlawry.*

The defendant may be relieved from the outlawry, either by reversing it, or by obtaining the king's pardon.

There are two modes of reversing a judgment of outlawry: upon motion, or by writ of error *coram nobis*. The latter, however, is seldom or ever resorted to in practice, being much more expensive and dilatory than the former; for the Court will now reverse an outlawry upon motion, for error in fact not appearing upon the record, (such as that the defendant was in prison (*p*), or beyond sea, at the time of the *exigent* awarded (*q*), and this though he purposely went abroad to avoid the outlawry or his creditors (*r*),) as well as for defects or errors in the proceeding apparent on the record. But the Court will not set aside an outlawry merely on the ground of the defendant's having constantly appeared in public during the proceedings against him, unless perhaps he swears he had no notice of them (*s*).

Though the outlawry be illegal and voidable, it cannot be set aside by a third person in a collateral action (*t*).

(*m*) See as to the forms, Chit. Forms, 656.

(*n*) See *Rex v. Wilks*, 4 Bur. 2539, 2540.

(*o*) *Spinks v. Bird*, Pr. Reg. 184, Barnes, 434, S. C.

(*p*) *Beauchamp v. Tomkins*, 3 Taunt. 141; *Hely v. Hewson*, Barnes, 321; *James v. Jenkins*, 9 Moore, 589.

(*q*) *Heese v. Wood*, 4 Taunt. 691; *Graham v. Henry*, 1 B. & Ald. 131; *Bryan v. Wagstaffe*, 5 B. & C. 314, 8 D. & R. 208, 1 M. & P. 135, n., S. C.

(*r*) Id.

(*s*) *Johnson v. Driver*, 1 Dowl. P. C. 127.

(*t*) *Symonds v. Parminter*, 1 W. Bla. 20.

*Reversal upon motion.*] The Court, or a Judge at chambers, will reverse the outlawry as a matter of course, upon condition that, in outlawry upon mesne process, the defendant put in and perfect bail, or enter a common appearance, to a new action, according as the action is bailable or otherwise: in outlawry upon final process, upon the defendant's satisfying the plaintiff his debt or damages; and in both cases, upon payment of costs (u). Formerly the defendant was obliged to appear in person, when he applied to reverse an outlawry; but now he may appear by attorney (4 & 5 W. & M. c. 18, s. 3) (x). If the party outlawed do not appear in person, the person making the application must state in his affidavit that he makes it on the behalf and by the authority of the outlaw (y). A party outlawed can only appear in court for reversing his outlawry, and not for any other purpose (z). A motion to reverse an outlawry has been refused because the record was not in court (a).

In nonbailable actions, the Court order the defendant to enter a common appearance; in bailable actions, to put in and perfect bail. (See 4 & 5 W. & M. c. 18, s. 3). In this latter case, however, it is entirely in the discretion of the Court, whether the recognizance be in the alternative, to pay the condemnation money or render the defendant; or absolute, for the payment of the condemnation money, as in the case of bail in error (b). Where the defendant was abroad at the suing out of the *exigent*, and it appeared that he had not gone abroad for the purpose of avoiding the process of the court, bail in the alternative merely was required (c). To this, however, there is one exception, namely, where the defendant seeks to reverse the outlawry for want of proclamations; then, before the allowance of the writ of error, or reversing the outlawry by plea or otherwise, he must put in bail, not only to appear and answer the plaintiff, but also to satisfy the condemnation, provided the plaintiff shall begin his suit before the end of two terms next after allowing the writ of error, or otherwise avoiding the outlawry (31 El. c. 3, s. 3); in which case it is not at the discretion of the Court to order the recognizance to be in the alternative (d).

In order to reverse the outlawry upon mesne process, in nonbailable actions, *enter an appearance for the defendant, as directed Vol. 1, 454; and get a certificate from the clerk of the common bails of your having done so. Get a copy of the exigent, and mark on it some common error (if no real error be in the proceedings) such as the want of addition, or that the defendant was in prison or out of the country at*

(u) See *Summervil v. Watkins*, 14 East, 536; *Hesse v. Wood*, 4 Taunt. 691; *Solly v. Forbes*, 2 Moore, 567, 8 Taunt. 516, S. C.

(z) *Anon.* Lofft, 372, 520.

(y) *Pimket v. Buchanan*, 5 D. & R. 625, 3 B. & C. 736, S. C.

(z) *Louches v. Holbeche*, 1 M. & P. 126, 4 Bingh. 419, S. C.

(a) Lofft, 348, 370.

(b) *Graham v. Henry*, 1 B. & Ald. 131.

(c) *Id.*; and see *Graham v. Grill*, 1 M. & Sel. 409; *Mathews v. Gibson*, 8 East, 527; *Havelock v. Geddes*, 12 East, 692; *Serocold v. Hampsey*, *Id.* 624.

(d) See Tidd, 9th ed. 141, 142; *Taylor v. Waters*, 2 B. & C. 353, 3 D. & R. 575, S. C.; *Roger v. Cooke*, 3 B. & C. 529, 5 D. & R. 302, S. C.

*the time of issuing the exigent, or the like; and take these to a judge at chambers, and he will make an order for the reversal of the outlawry, upon payment of costs. Take the order to the filacer, who will thereupon enter the proceedings on the roll (if they have not already been entered by the plaintiff), and docket the same in his office. Then take the order and roll to the master, who will mark in the margin of the roll that the outlawry is reversed; after which you take the roll back to the filacer, who will mark the outlawry reversed in his book, and enter the reversal on the roll (e). You then take the roll, and file it in the treasury, as directed Vol. 1, 223. If the outlawry have been entered on the roll by the plaintiff's attorney, you must take the order to the master, who will thereupon attend at the treasury, and mark the roll; after which the filacer enters the reversal on the roll, and strikes the entry of the outlawry out of his book, as above mentioned. If the order be drawn up on payment of costs, the costs must of course be taxed and paid before the outlawry can be reversed.*

*In bailable actions, as soon as your bail have justified, or, if done at any time afterwards, then upon affidavit of the bail having justified, move the court to reverse the outlawry. Previously to making the motion, give the copy of the exigent, marked as above mentioned, to the master, who will shew it to one of the judges at the time the motion is made. Then take the rule to the filacer, and proceed as above directed.*

*The defendant may also sue out a supersedeas with the filacer, upon which he shall be discharged out of custody, if taken on the capias ullagatum, or it will prevent the sheriff from executing a capias ullagatum, general or special, against him in the same cause, if not already executed (f). Or if his property be still in the sheriff's hands under a special capias ullagatum, and the produce of it not paid over to the plaintiff (g), it shall be restored to him by a writ of amoveas manus, or other proceeding in the Court of Exchequer, for which he must apply to his clerk in court.*

*When the defendant is outlawed after judgment, he may reverse it upon application to a judge at chambers. As the condition of reversing it in this manner, however, is the payment of the debt and costs to the plaintiff, you must first get him to enter satisfaction on the roll, before you can make the application. Get a certificate to that effect from the clerk of the treasury; and take it, together with a copy of the exigent marked as above mentioned, to a judge at chambers, who will thereupon make an order. Afterwards you proceed as above directed.*

*Reversal by writ of error.] Judgment of outlawry may be reversed by writ of error coram nobis, either for matter of law apparent upon the record, or for matter of fact not appearing upon it. (See Vol. 1,*

(e) See the form of *supersedeas*, 656.  
Chit. Forms, 656.

(f) See a form of entry, Chit. Forms,

(g) See *Pinfold v. Northey*, 2 Lev. 49; and see 5 Co. 90; Cro. El. 278.

329). *As to the mode of proceeding in this case, see Vol. 1, 370, 324 (h).* Bail must be put in and perfected in the same cases and in the same manner, as where the outlawry is reversed upon motion, &c. If the judgment be reversed, the *supersedeas* is made out and signed by the clerk of the errors (*i*).

This mode of proceeding by writ of error, however, is very seldom adopted in practice; for the Court will always afford relief upon motion, as already mentioned, if the defendant be willing to comply with those conditions upon which alone they will grant it, namely, entering an appearance or putting in and perfecting bail, and paying the costs of the outlawry, where the outlawry was upon *mesne* process; or paying the debt and costs, and the costs of the outlawry, where the outlawry was upon final process. There may be cases, however, in which reversing an outlawry by writ of error may be advisable.

*Costs.*] The party reversing the outlawry is in all cases obliged to pay the costs (*k*). But where it has appeared that the plaintiff proceeded to outlawry, merely for the purpose of harassing and oppressing the defendant,—as where it appeared that the defendant was actually in custody at the suit of the plaintiff for another cause of action, at the time of the *exigent* awarded (*l*), or where the defendant was constantly to be met with, and might have been arrested, or served with process (*m*),—the Court have ordered the plaintiff to reverse the outlawry at his own expense.

(h) See as to the form, Chit. Forms, 246 to 254.

(i) See a form of *supersedeas*, Chit. Forms, 658.

(k) See *Graham v. Grill*, 1 M. & Sel. 409; *Summervil v. Watkins*, 14 East, 536; *Hesse v. Wood*, 4 Taunt. 691; *Graham v. Henry*, 1 B. & Ald. 131.

(l) *Adlame v. Colebatch*, 2 Salk. 495; *James v. Jenkins*, 9 Moore, 589.

(m) *Seabrook v. Howkin*, Sir Thos. Jones, 211; *Hilliard v. Smith*, Comb. 19; *Hill v. Wilkes*, 12 Mod. 413. See *Holman v. Brazier*, Barnes, 320; *Tumworth v. Smith*, Id. 322; *Roger v. Cook*, 3 B. & C. 532, 5 D. & R. 302, S. C.

## CHAPTER III.

## REMOVAL OF PRISONERS INTO THE CUSTODY OF THE MARSHAL.

PRISONERS in the custody of the sheriff, or in the prisons of inferior courts, may be removed into the custody of the marshal, by the writ of *habeas corpus ad faciendum et recipiendum* (usually called a *habeas corpus cum causâ*), or by the writ of *habeas corpus ad respondendum*, or the writ of *habeas corpus ad satisfaciendum*, according to circumstances.

*Habeas corpus cum causâ.*] If the defendant be in custody of the sheriff, or in the Fleet or other prison, under process of this Court, he has a right to remove himself into the custody of the marshal, if he wish it, by this writ of *habeas corpus cum causâ*, even although he should also at the same time be detained upon process of the Common Pleas or other Courts. Or if he be not in custody upon process of this Court, but upon the process of some inferior court (not being the Court of Common Pleas, Exchequer, or perhaps the Courts of the counties palatine (*a*) only), he has a right to remove himself into the custody of the marshal by this writ, if he wish it; in which case, the action commenced in the inferior court is also removed with him. (*See the next Chapter*). Or he may remove himself by this writ, when he is in custody of the *sheriff*, under process of the Court of Common Pleas, Exchequer, &c. only, by previously getting one of his creditors to make an affidavit to hold him to bail, and thereupon suing out process in this Court, and lodging it with the sheriff in whose custody he is. Or, if he be in custody in the *Fleet*, under process of the Court of Common Pleas, Exchequer, &c. only, he may remove himself into the custody of the marshal, by getting a creditor to sue out a bailable writ against him in this Court, as above mentioned, putting in special bail to it, and then having himself brought up by *habeas corpus cum causâ*, for the purpose of rendering in discharge of his bail.

The plaintiff, also, may remove the defendant from the custody of the sheriff, by this writ, in order to declare against him in the custody of the marshal (*b*); which, however, never occurs in practice, (unless done at the desire of and to oblige the defendant), because the plaintiff may as well declare against the defendant in the custody of the sheriff, without removing him. (*See ante*, 644).

By this writ, also, a prisoner in the Fleet, or in the custody of the

(a) See *Sink v. Langton*, 2 Doug. 749; Gilb. Exec. 201.

(b) *Bettenworth v. Bell*, 3 Bur. 1875.

marshal, sheriff, &c. may be brought up, in order to be rendered by his bail, in an action pending in this Court; (*Vol. 1, 420*); after which he will be committed to the custody of the marshal; unless he be in custody upon a criminal account, in which case the Court usually remand him to the prison from whence he has been brought. (*See the cases, cited Vol. 1, 420*). Before the recent act, 1 W. 4, c. 70, a defendant, who was in custody in a county jail, could not be rendered in discharge of his bail, in any other action pending against him, otherwise than by bringing him up by *habeas corpus*, and rendering him to the custody of the marshal or warden; but, by the 22nd section of that act, this *habeas* is no longer requisite for that purpose. (*See Vol. 1, 420*).

This writ is grantable, of course, and may be sued out in term or vacation; but it must bear teste in term. It may be made returnable immediate (c). Engross it on a plain piece of parchment (d); and write out a præcipe on plain paper. Take them to the signer of the writs, and get the writ signed; pay 6s. 8d. in term, 7s. 8d. in vacation; get it sealed, pay 7d. It must be signed by the Chief Justice, or, in his absence, by one of the other Judges of the Court out of which it issued; (1 & 2 P. & M. c. 13, s. 7); and unless so signed, the sheriff is not obliged to execute it (e). Take it to the office of the sheriff or officer in whose custody the defendant is, and he will have him brought up to the Judge's chambers; pay him 9s. 4d. for the first action, and 2s. 4d. for each of the others (if any); and pay for taking him to the Judge's chambers, 10s. 6d. in town, or 1s. per mile if at a distance from London (f). The officer should bring him to the Judge's chambers in due and convenient time (g), without permitting him to wander under pretence of such writ. (*R. M. 1654, s. 7-10*). Neither should the officer deviate from the direct road, or allow the defendant to go at liberty in conveying him to the Judge's chambers, for if he do, it would be an escape (h): he must also take force sufficient to prevent the defendant from being rescued, as a rescue of the defendant would make the sheriff liable to an action for an escape (i). If the officer, to whom the writ is directed, do not obey it, he will, after being ruled to return the writ (k), be liable to an attachment (l). When the prisoner is brought up to chambers, any of the Judges who are then sitting (although the writ be returnable before the Chief Justice only) will commit him to the King's Bench prison, and he will be sent there in the custody of a tipstaff. Pay the tipstaff 6s. (m). If the writ be directed to the marshal, it remains with him, and is not returned to this Court (n); and the same when directed to the warden of the Fleet.

(c) *Bettesworth v. Bell*, 3 Bur. 1875.

(d) See the form, Chit. Forms, 659.

(e) *Rex v. Roddam*, Cowp. 672.

(f) See *Anon.* 1 Str. 308; *Hopman v. Barber*, 2 Id. 814.

(g) *Bettesworth v. Bell*, 3 Bur. 1875.

(h) Roll. Abr. Escape, D. 9; Cro. Car.

14; *Balden v. Temple*, Hob. 202.

(i) *Compton v. Ward*, 1 Str. 429.

(k) *Semble, Rex v. Wright*, 2 Str. 915.

(l) *Rex v. Winton*, 5 T. R. 189.

(m) See *In re Salisbury*, 5 B. & Ald. 266.

(n) *Cooper v. Jones*, 2 M. & Sel. 202.



As to the mode of proceeding, where the defendant is brought up for the purpose of being rendered in discharge of his bail, see *Vol. 1*, 420.

*Habeas corpus ad respondendum.*] Heretofore, if a defendant were in custody of the sheriff or marshal, upon process issuing out of this Court, and was removed to the Fleet before declaration, the plaintiff must have either removed him back into the custody of the marshal by this writ of *habeas corpus ad respondendum*, in order to declare against him, or else declared against him as if the action had been originally commenced in the Common Pleas, or else have commenced a new action against him in the Common Pleas; but this *habeas* is now, it seems, no longer requisite. (*See ante*, 641, 644).

Also, heretofore, if you wish to commence a bailable action in this Court against a prisoner in the Fleet, you might have him brought up to Court for the purpose, by this writ (*o*); but this is, it seems, no longer requisite, and you may detain him in custody under a writ of detainer. (*See ante*, 635, 636).

This writ must be tested in term, and returnable in Court on a day certain. *Sue it out in the same manner as the habeas corpus cum causa.* (*See ante*, 715) (*p*).

By *R. M.* 1654, s. 7, when a *habeas corpus ad respondendum* is delivered to the officer to whom it is directed, it is a good cause of detainer, in the same manner as when a *capias* is lodged with the sheriff; but see now the 2 *W. 4*, c. 39, s. 8, *ante*, 636.

It has been holden that after a prisoner is removed into the custody of the marshal under this writ, he cannot be removed into any other custody, until he have answered to the action here (*q*).

*Habeas corpus ad satisfaciendum.*] If a defendant against whom you have a judgment in this Court, be a prisoner in the Fleet, or in the prison of any inferior court, you may have him brought up here by writ of *habeas corpus ad satisfaciendum*, in order to charge him in execution. (*See ante*, 643, 644).

This writ must bear teste in term, and be returnable in Court upon a day certain. *Sue it out in the same manner as the habeas corpus cum causa* (*r*). (*See ante*, 715). *Having made a duplicate of it, deliver*

(*o*) The Court, however, have refused this writ, to bring up a prisoner who was in the house of correction for punishment, for the purpose of charging him with a declaration in this Court, that prison being by statute under the cognizance of justices of peace only, and the keeper appointed by them. *Brandon v. Davis*, 9 *Enst.* 154; *Guthrie v. Ford*, 4 *D. & R.* 271; and see *Green v. Cromer*, *Vol. 1*, 421, *MS. T.* 1825. See also *Keach's case*, 1 *Salk.* 351; *Dowler v. Krite*, 2 *Ld. Raym.* 789; *Rutherford v. Scott*, 2 *Str.* 936; *Leigh v. Sherry*, 8 *Taunt.* 140; *Currie v. Kinnear*, 1 *B. & B.* 23. So

they have refused it, to bring up a prisoner from the Marshalsea prison, where the plaintiff wished to charge him with a declaration in this Court for the same cause of action for which he was already in custody. *Melsome v. Gardner*, 1 *Cowp.* 116.

(*p*) See the form of the writ, *Chit. Forms*, 661.

(*q*) *Anon.* 1 *Salk.* 350.

(*r*) Before the *R. H.* 2 *W. 4*, r. 95, it was necessary to mark the term and number of the roll of the judgment on the *habeas*, when a defendant was brought up to be committed in execution; but, as that rule dispenses with

*the writ to the officer to whom it is directed, who will bring the prisoner up to Court on the return day. When the prisoner is brought up, give the duplicate of the habeas to the Judge's clerk, who will take it to the master; and the master will then mark the commitment on the duplicate, and give it to the tipstaff, in whose custody the prisoner is taken to the King's Bench prison; the habeas itself is filed in Court. Pay the master 2s., the Judge's clerk 4s., clerk of the papers 1s., deputy marshal 2s., and usher 6d.; and pay the tipstaff 6s. (s). Where the habeas is issued for the residue of a debt, after a *fi. fa.* is executed, it is not necessary that the former writ should refer to what has been done under the *fi. fa.* (t). As to the mode of charging the defendant in execution, see ante, 643.*

the entry of the proceedings on record, 266.

that step is no longer requisite. See the form, Chit. Forms, 661.

(s) See *In re Salisbury*, 5 B. & Ald.

(t) *Green v. Foster*, K. B. 9th June, 1833, *cor. Taunton, J.*, 6 Leg. Obs. 237.

## CHAPTER IV.

## REMOVAL OF CAUSES FROM INFERIOR COURTS.

*How, and in what cases.*] CAUSES from inferior courts, not being courts of record, may be removed into this Court by writs of *pone*, *recordari facias loquelam*, or *accedas ad curiam*, according to circumstances; and from inferior courts of record, by *habeas corpus* or *certiorari*. But as causes depending in inferior courts not of record are seldom in practice removed into this Court, except in replevin, it is merely necessary here shortly to refer to a former part of this volume, (580, &c.), where the writs of *pone*, *recordari facias loquelam*, and *accedas ad curiam*, have been already noticed. We shall accordingly confine our attention in this chapter to the writs of *habeas corpus cum causa* and *certiorari*, the writs used to remove causes into this Court from inferior courts of record, as already mentioned.

The writ of *habeas corpus cum causa*, when directed to inferior courts of record, removes not only the body of the prisoner, but also the several actions with which he is there charged, into this Court, and the prisoner is thereupon committed to the custody of the marshal. (*Ante*, 714). This writ, however, lies only in cases where the defendant has been brought before the inferior court by process against his person, bailable or non-bailable, or, in other words, where it appears that the defendant is actually or virtually in the custody of the Court below (a), and therefore where the proceedings in the inferior court were by plaint only, the Court held that they could not be removed by *habeas* (b).

The *certiorari* lies in all cases before judgment, whether the action were commenced by process against the person or not; and it may be sued out to remove an ejectment, as well as other actions pending in inferior courts of record (c). It is never adopted, however, in cases where the defendant has been actually arrested; because, if still in custody, his body is not removed by the writ; or, if not in custody, his bail are not discharged by the removal of the cause. In such cases, therefore, in practice, the *habeas corpus* is the writ adopted, because it removes the body as well as the cause, if the defendant be in custody, or has the effect of discharging the bail, if bail have been put in, in the court below.

But neither the *habeas corpus* nor the *certiorari* lies where the debt or damages laid or things demanded in the declaration in the

(a) *Mitchell v. Mitchinham*, 2 D. & R. 722; *Palmer v. Forgyth*, 4 B. & C. 401, 6 D. & R. 497, S. C.

(b) *Mitchell v. Mitchinham*, 2 D. & R. 722.

(c) *Goodright dem. Sadler v. Dring*, 2 D. & R. 407, 1 B. & C. 253, S. C.; *Patterson v. Eades*, 3 B. & C. 550, 5 D. & R. 445, S. C.

court below do not amount to 5*l.*, if the steward or judge of such court be a barrister of three years standing; unless the action concern the freehold or inheritance, or title to lands, lease or rent; (21 *J.* 1, c. 23, ss. 4, 6) (*d*); or if there be several causes, some under, and others above 5*l.*, those only which are above 5*l.* shall be removed by the *habeas*. (12 *G.* 1, c. 29, s. 3). Secondly, the record shall not be removed by *habeas* or otherwise, if the cause of action do not amount to 20*l.* (7 & 8 *G.* 4, c. 71, s. 6), unless the defendant with two sufficient sureties, enter into a recognizance in double the amount in the court below, conditioned for payment of the debt and costs in case judgment shall pass against him. (19 *G.* 3, c. 70, s. 6) (*c*). Thirdly, it lies not in cases where the action is maintainable only in the inferior court; as, for instance, where an action is brought in the Courts in London for calling a woman a whore (*f*), or against a feme covert as sole trader (*g*), it cannot be removed by this or any other writ, unless by a writ of error. Fourthly, it lies not to the counties palatine, unless some special grounds for the issuing of it be first laid before this Court (*h*). And, fifthly, it does not in general lie after judgment; and where a *certiorari* was moved for, to remove the record of a judgment in the Court at Durham, against a person, who was in the custody of the marshal in execution in an action in this Court, for the purpose of enabling his bail in the court below to render him here in their discharge, the Court refused it (*i*). But by statute 19 *G.* 3, c. 70, s. 4, where judgment is given in an inferior court of record (or in the courts of the counties palatine, 32 *G.* 3, c. 68, s. 1), any of the superior Courts at Westminster, (upon affidavit of such judgment being obtained, and of diligent search and enquiry having been made after the person of the defendant or his effects, and of execution having issued against his person or effects, as the case may be, and that his person or effects are not to be found within the jurisdiction of the inferior court), may cause the record of the judgment to be removed into such superior Court, and issue writs of execution thereon against the person or effects of the defendant, in the same manner as upon judgments in the said Courts at Westminster (*k*).

The writ is directed to the judge or steward of the inferior court, and it is tested on some day in term; and may be returnable immediate, if directed to the inferior courts of London, Westminster, Southwark, or other court within four miles of London; (see *R. H.* 13 & 14, *Car.* 2. *R. M.* 1654); and in all other cases on some day cer-

(*d*) See *Fairley v. M'Connell*, 1 Bur. 515.

(*e*) See *Atterborough v. Hardy*, 4 D. & R. 362, 2 B. & C. 802, S. C.

(*f*) *Watson v. Clerke*, Carth. 75.

(*g*) *Pope v. Vaux*, 2 W. Bl. 1060.

(*h*) *Jones v. Davies*, 1 B. & C. 143; and see *Edwards v. Bowen*, 5 B. &

C. 206, 7 D. & R. 709, S. C.

(*i*) *Patterson v. Reay*, 2 D. & R. 177; *Walker v. Gann*, 7 Id. 769.

(*k*) See the form of the affidavit in this latter case, Chit. Forms, 667; of the rule, Id. 668; and of the *certiorari*, Id. 668. See *Bulmer v. Marshall*, 1 D. & R. 537; *Jordan v. Cole*, 1 H. Bl. 532.

tain in term. (*R. H.* 13 & 14 *Car.* 2) (*l*). In cases where you are obliged to obtain the leave of the Court to sue out the writ, your affidavit must not be intituled in any cause; or if intituled, it cannot be read (*m*). <sup>6</sup>*Sue out the writ in the manner directed ante, 715, and leave it with the clerk of the papers, or secondary of the inferior court; you will have to pay the officer 5s. for the allowance, and 4d. for the jurat, if the writ be directed to the Palace Court.* It must be delivered to the judge, or officer of the inferior court, at latest before any of the jury are sworn; (43 *El.* c. 5); or before issue or demurrer joined, if such issue or demurrer be not joined within six weeks after the arrest or appearance of the defendant; (21 *J.* 1, c. 23, s. 2); or before judgment by default (*n*), or, at all events, before any one of the inquest are sworn, after a judgment by default (*o*); otherwise the writ shall not be received or allowed by such judge or officer, and the inferior court may proceed in the cause.

*How obeyed and returned.*] In cases where the writ lies, it has the effect of suspending all proceedings in the actions against the defendant in the inferior court, immediately upon its being delivered to the officer (*p*); and the writ must be obeyed without delay (*q*). The *habeas corpus* is obeyed, by bringing up the defendant (if in custody), (see *ante*, 715), and by returning the causes with which he stands charged; the record itself is not removed into this court, but remains in the court below (*r*). The *certiorari* is obeyed by returning the record itself, formally made up, into this court, in order to be further proceeded upon here (*s*). If, under the particular circumstances of the case, the writ does not lie, those circumstances must be stated specially in the return (*t*).

*Bail and appearance.*] If the defendant be in custody when the writ of *habeas corpus* is delivered to the court below, he is removed by it into the custody of the marshal, as already mentioned, *ante*, 715; after which he may put in bail in the manner hereinafter directed, and be discharged. But if he be not in actual custody when the writ is returned, he must put in special bail, or enter a common appearance in this court, according as the action is bailable or nonbailable, if called upon to do so.

The defendant should not be admitted to bail by the court below after the delivery of the writ; nor can he, whether in custody or not, put in bail in this court, until the writ be actually returned. (*R. M.* 1651. *R. E.* 29 *C.* 2. *R. H.* 10 *W.* 3). If the defendant be not in

(*l*) See the form of the *habeas corpus*, *Chit. Forms*, 659; and of the *certiorari*, &c. *Id.* 666; and of the different directions of writs of *habeas*, &c. *Id.* 659.

(*m*) *Ex p. Nohro*, 1 B. & C. 267.

(*n*) *Wyatt v. Maricham*, Barnes, 221.

(*o*) *Cor v. Hart*, 2 Bur. 759.

(*p*) *Fazachary v. Baldo*, 1 Salk. 352.

(*q*) See *Bettesworth v. Bell*, 3 Bur. 1875.

(*r*) *Fazachary v. Baldo*, 1 Salk. 352.

(*s*) See *Palmer v. Forsyth*, 4 B. & C. 401, 6 D. & R. 497, S.C.; *Askew v. Hayton*, 1 Dowl. P. C. 510.

(*t*) See forms of return, 'Tidd's Forms, 147, 156.

custody, he may either put in bail voluntarily, or the plaintiff may compel him to do so, by obtaining from one of the judge's clerks a rule for a *procedendo*, unless the defendant put in bail within four days after notice thereof, if in *term*, or within six days, if in *vacation*. (See *R. M.* 1654, s. 8. *R. H.* 10 *W.* 3) (*u*). Pay 3s. 6d. in *term*, 4s. 6d. in *vacation*. There is no time limited for the plaintiff's obtaining this rule; he may do it at any time after the return of the writ (*x*).

Special bail is put in thus:—*Get the habeas corpus returned. Engross the bail piece on a plain piece of parchment (y); and annex it to the habeas corpus and return. Take these to the judge's chambers, or to a commissioner in the country, and, having the bail with you, their recognizance will be taken as in ordinary cases.* (See *Vol.* 1, 153, 176). *Give notice to the plaintiff's attorney, and accompany it with affidavits of their sufficiency, as in ordinary cases of bail being put in.* (See *Vol.* 1, 154, 156) (*z*). It should be noticed that if there be several defendants, and the cause be removed by one of them, he must put in bail for all, otherwise a *procedendo* may be awarded (*a*).

The plaintiff is allowed twenty days after service of the notice of bail, to except to them; (*R. H.* 2 *W.* 4, r. 25); and if he do not except to them within that time, the defendant's attorney shall file the bail piece within four days afterwards. (*R. M.* 16 C. 2). But if he intend to except to them, then let him (as above directed) *get another rule for a procedendo, unless bail be perfected within four days after service of the rule; (R. M.* 16 C. 2) (*b*); and serve a copy of it on the defendant's attorney (*c*).

When the defendant is served with this rule, the notice of justification must be given, as in ordinary cases, and the bail must justify, or the defendant be rendered, otherwise the plaintiff may sue out a *procedendo* within four days after the service of the rule. (See *Vol.* 1, 162, &c.). The bail justify as in ordinary cases (*d*). *As to the liability of the bail, see R. H.* 2 J. 2 (*e*). It may be necessary to mention here, that by putting in bail in this court, the bail in the court below (if any were given) are discharged; even although the bail below (by the custom of the court) were liable absolutely to pay the condemnation money and costs, and the bail in this court liable in the alternative merely, to pay or render (*f*).

In nonbailable actions, removed by *habeas* or *certiorari*, you file common bail thus:—*Engross the bail piece, and annex it to the writ and return, as above directed: file the same at the judge's chambers, and give notice to the plaintiff's attorney of your having done so (g).* In cases, however, where the cause of action does not amount to 20l.

(u) See the form, Chit. Forms, 662.

(r) *Clarke v. Harbin*, Barnes, 90; see 4 D. & R. 350.

(y) See the form, Chit. Forms, 662.

(z) See the form, Chit. Forms, 663.

(a) *Krat v. Goldstein*, 7 B. & C. 525, 1 M. & R. 305, S. C.

(b) See the form, Chit. Forms, 664.

(c) See *Anon.* 1 Salk. 97.

(d) See the form of the notice of justification, Chit. Forms, 664.

(e) Tidd, 410; 2 Sellon, 273.

(f) MS. M. 1814; *Taylor v. Shapland*, 3 M. & Sel. 328.

(g) See the form of the common bail piece, Chit. Forms, 664; and of the notice of having filed it, *Id.* 665.

(7 & 8 G. 4, c. 71, s. 6), the defendant, before he can even remove the cause from the court below, must enter into a recognizance there, with two sufficient sureties, in double the sum due, for the payment of the debt and costs, in case judgment shall pass against him. (19 G. 3, c. 70, s. 6) (*h*).

*Procedendo*.] If the defendant do not *put in bail* within the time limited by the rule for that purpose, the plaintiff may sue out a *procedendo*. This writ is grantable by any Judge of the Court into which the cause was removed, upon application to one of their clerks at chambers. *Engross the writ upon plain parchment (i), directed to the inferior court, commanding them to proceed in the action. Make out a præcipe for the effice. Get the writ signed by the signer of the writs; pay 5s. 8d., and sealed, pay 7d. Take it to the secondary of the inferior court, and file it; and the cause will be then proceeded in, in the inferior court, from the stage in which it was at the time the habeas or certiorari was served. But if bail be put in after the expiration of the rule, and before the procedendo sued out, it seems the procedendo cannot be sued out afterwards. Nor can it be sued out, if the defendant has rendered himself after the expiration of the rule (k).*

So, if the defendant do not *justify his bail* within the time limited by the rule for better bail, the plaintiff may sue out a *procedendo*. (*Ante*, 721). And generally, if the defendant, upon removing a suit commenced against him, does not comply with the statutes and rules of court made to regulate the proceedings therein upon such removal, as by *not pleading in due time* to the declaration delivered, or the like, the plaintiff may obtain a *procedendo*. Also, if the court below state, in their return to the *habeas* or *certiorari*, circumstances from which the court judge that the writ ought not to have issued, a *procedendo* will be awarded (*l*).

After the cause has thus been remanded, it can never afterwards be removed before final judgment. (21 J. 1, c. 23, s. 3). Even where the plaintiff, after the cause was thus remanded, recovered in the court below, and then sued the bail below upon their recognizance, who removed the proceedings into this court by *habeas*, the court upon application awarded a *procedendo* (*m*).

*Proceedings after removal*.] After the cause has been removed into this court by the plaintiff, the plaintiff may be compelled to proceed, as pointed out *ante*, 583. After the cause has been removed into this court by the defendant, the plaintiff may proceed in the action or not, at his discretion; there are no means of compelling him to do so (*n*).

(*h*) See *Atterborough v. Hardy*, 4 D. & R. 362, 2 B. & C. 102, S. C.; *ante*, 719.

(*i*) See forms of *procedendos*, Chit. Forms, 665, 666.

(*k*) *Johnson v. Walker*, 4 B. & Ald. 535; and see *Wiggins v. Stephens*, 5 East, 533.

(*l*) See *Carth. 75; Pope v. Faur*, 2 W.

Bl. 1060; *Fazachary v. Baldo*, 1 Salk. 352; *Horton v. Beckman*, 6 T. R. 760; *Jones v. Davies*, 1 B. & C. 143; and see *Fry v. Carey*, 1 Str. 527.

(*m*) *Dixon v. Heslop*, 6 T. R. 365.

(*n*) *Clack v. Dixon*, 3 M. & Sel. 93; *Clerk v. Mayor of Berwick*, 4 B. & C. 649, 7 D. & R. 104, S. C.

If he do proceed, he must begin *de novo*, by declaring against the defendant as in the custody of the marshal, whatever may have been the stage in which the cause was in the inferior court at the time it was removed. (*R. M. 16 C. 2*) (*o*). And the plaintiff must declare within the second term inclusive, after bail has been put in and perfected, otherwise the cause will be out of court, and the defendant need not receive the declaration (*p*); but he cannot *nonpross* the plaintiff. (*R. M. 16 C. 2*) (*q*). The plaintiff, however, cannot declare before bail is put in. There is no objection to the plaintiff's declaring in a different form of action from that which he commenced in the court below, provided it be for the same cause of action (*r*), and not for a larger amount (*s*).

The time for pleading is the same as in *replevin*, *ante*, 586; but no imparlance is allowed, although the plaintiff do not declare until the next term after the bail are perfected, provided he declare on or before the last day of the term (*t*). The subsequent proceedings are the same as in ordinary cases.

If the plaintiff have judgment, he shall be entitled to and allowed the costs of the proceedings in the inferior court. (*R. M. 1654, s. 22*).

(*o*) *Fazachary v. Baldo*, 1 Salk. 352; *Turner v. Bean*, Barnes, 345. The rule of M. T. 3 W. 4, ordering the forms of commencements of declarations, does not apply to causes removed from inferior courts.

(*p*) *Clarke v. Harbin*, Barnes, 90; *Hutton v. Stroubridge*, 1 Str. 631.

(*q*) *Davies v. James*, 1 T. R. 372; *Clerk v. Mayor of Berwick*, 4 B. & C. 649, 7 D. & R. 104, S. C.

(*r*) *Gunn v. Mackheury*, 1 Wils. 277.

(*s*) *Wyatt v. Evans*, 3 Salk. 55.

(*t*) See *ante*, 596, and *Smith v. James*, 6 T. R. 752.



## CHAPTER V.

## CLAIM OF CONUSANCE.

*In what cases.*] INFERIOR courts of record (*a*) having a grant of "conusance of pleas," with or without exclusive words, may claim conusance, if an action for a cause within their conusance be brought in this Court (*b*). But conusance shall not be allowed, when the franchise claiming it cannot give a remedy, and when consequently there would be a failure of justice (*c*); as in *quare impedit* (*d*), replevin (*e*), waste (*f*), or attain (*g*); nor shall it be allowed after the cause has been removed from the inferior court by writ of error (*h*), or where the corporation or lord to whom the franchise was granted, are themselves parties (*i*), or in *quo warranto* informations (*k*); nor shall it be allowed, where the defendant is a stranger, not having any property within the franchise (*l*), or where the action here is against an heir on the bond of his ancestor, and he hath no assets within the jurisdiction of the inferior court (*m*); nor shall it be allowed, where the plaintiff is an attorney or officer of this Court, and consequently privileged to sue here (*n*). The defendant's being in the custody of the marshal, however, does not oust the inferior court of its jurisdiction (*o*).

As to the species of actions in which conusance is allowed, it depends entirely upon the charter by which the franchise has been granted: the universities have conusance in personal actions only (*p*); in other cases the conusance is usually confined to local actions (*q*); but in all cases, the actions in which it is claimed must be such as were in *esse* at the time of the charter, and not subsequently created by statute (*r*).

*When to be made.*] Conusance must be claimed before the defen-

(a) 2 Inst. 140; Co. Lit. 117 b.  
(b) See 2 Bac. Abr. Courts, (D) 3; 1 Sellon, 257; Hardr. 509, 510; *Jennings v. Hankyn*, Carth. 11, 354.

(c) 1 Ro. Abr. 489.

(d) 44 E. 3, 29 b; 26 E. 3, 73; Co. Lit. 134.

(e) 38 E. 3, 31; 2 Inst. 140; Bro. Conusance, 4, 23.

(f) 1 H. 4, 5.

(g) Dy. 202; Keilw. 210; Co. Lit. 294.

(h) 50 Ass. 9.

(i) Bendl. 88, pl. 134; *Day v. Savadge*, Hob. 87.

(k) Keilw. 88 to 90.

(l) 22 Ass. 83.

(m) *Brown v. Carrington*, Cro. Jac. 502; 2 Ro. Rep. 48.

(n) Lit. Rep. 40, 304; 3 Leon. 149; *Jolliffe v. Langston*, 1 Ld. Raym. 342; ante, 630.

(o) Bro. Conusance, 50; *Jennings v. Hankyn*, Carth. 12; *Jones v. Bodeenor*, 1 Ld. Raym. 135.

(p) See Lit. Rep. 352; *Halley's case*, Cro. Car. 87, 88; *Thurnton v. Ford & Serle*, 15 East, 634; *Williams v. Brickenden*, 11 East, 543.

(q) 4 Inst. 213; Tidd, 631.

(r) 14 H. 4, 20. See 22 E. 4, 23; 2 Bac. Abr. Courts, (D) 3.

dant has pleaded (*s*), and even before imparlance (*t*); and in cases where the cause of action appears in the writ, it must be claimed upon the return day of the writ (*u*).

*How made.*] The claim must be entered on a roll (*x*); and if the franchise were immemorial, and not founded upon any express charter, a former allowance of it in this Court or in Eyre must be stated (*y*). Such allowance, or, in the case of an express charter or private statute, then the charter itself, or an exemplification of it under the great seal (*see Vol. 1, 229, 231*), or an exemplification (*z*), or copy (*see Vol. 1, 229*), of the private statute, must be produced in Court. Also, where the claim is made by one of the universities, a certificate of the chancellor of such university that the defendant is a resident member, and also an affidavit to the same effect, must be produced (*a*).

The claim is exhibited in Court, and a motion is made that it be allowed. Then, upon the claim and the other documents above mentioned being read, the Court grant a rule upon the plaintiff to shew cause why the conusance should not be allowed; and upon cause shewn or default made, the Court make the rule absolute or discharge it, as in ordinary cases (*b*).

Conusance may be claimed by the bailiff of the franchise (*c*), or by the chancellor, vice-chancellor (*d*), or even the deputy of the vice-chancellor, of either of the universities (*e*); if made by attorney, the letter of attorney must be produced in Court and filed (*f*).

If conusance be allowed, a transcript of the record is sent to the inferior court; but the record itself remains here; and if the plaintiff afterwards cannot have justice done him in the court below, he may have a resummons upon the record remaining in this Court (*g*).

(*s*) *Wells v. Trechern*, Barnes, 346.

(*t*) Willes, 233, S. C.

(*u*) *Leasingby v. Smith*, 2 Wils. 406, 413; *Re v. Agur*, 5 Bur. 2820. See *Browne v. Renouard*, 12 East, 12.

(*x*) *Paternoster v. Graham*, 2 Str. 810; *Leasingby v. Smith*, 2 Wils. 406. See the form of the entry, *Browne v. Renouard*, 12 East, 15.

(*y*) *Foster v. Heam*, 1 Ld. Raym. 427; *Foster v. Mitton*, 1 Salk. 183; 9 Co. 27 b, 28 a.

(*z*) See *Kendrick v. Kynaston*, 1 W. Bl. 454.

(*a*) *Paternoster v. Graham*, 2 Str. 810; *Hayes v. Long*, 2 Wils. 312.

(*b*) See *Browne v. Renouard*, 12 East, 12. See *Leasingby v. Smith*, 2 Wils. 406; Comb. 119.

(*c*) Bro. Conusance, 36, 50.

(*d*) *Williams v. Brickenden*, 11 East, 543.

(*e*) Hardr. 505.

(*f*) *Bishop of Ely's case*, 1 Sid. 103; 1 Lev. 87; and see *Williams v. Brickenden*, 11 East, 543; *Browne v. Renouard*, 12 Id. 12 to 15.

(*g*) 1 Sellon, 257; Tidd, 634.

## CHAPTER VI.

## CHANGE OF VENUE.

It should be premised that the Court will, in some cases, noticed *Vol. 1, 217*, order the issue or inquiry to be tried or executed in another county than that in which the venue is laid, but this practice is distinct from that of changing the venue.

*How and in what cases, by defendant.]* Local actions must be brought in the county in which the cause of action arose; transitory actions, either in the county where the cause of action arose, or in any other county, at the option of the plaintiff. But if the plaintiff bring a transitory action in any other county than that in which the cause of action arose, the defendant, upon application to the Court, founded upon an affidavit, "that the plaintiff's cause of action (if any) arose in the county of B. and not in the county of A." (where the action is brought) "or elsewhere out of the said county of B." can have the venue changed to the county where the cause of action really arose (*h*). This motion is a motion of course upon counsel's signature, and is absolute in the first instance (*i*). *Draw up the rule with the clerk of the rules; pay 4s., and serve a copy of it on the plaintiff's attorney, who will thereupon alter the declaration.* In vacation you may obtain a Judge's order to the same effect:—*Get a motion paper signed by counsel; and take it, together with the Judge's order and affidavit, to the clerk of the rules, who will thereupon draw up the rule.* This application cannot be made before the defendant has appeared (*k*). Formerly it should have been made before the expiration of eight days after the declaration had been filed or delivered, if there were eight days remaining of the term (*l*); but if there were not eight days, it might then have been made in the vacation or term following. (*R. M. 1654, s. 5*). And it could not have been made on the last day of term unless the declaration was delivered so late as to prevent the motion from being made before (*m*). Now, however, it may it seems be made any time after appearance, and before the defendant has pleaded (*n*): but not after plea pleaded (*o*), unless under particular circumstances, and justice clearly require it (*p*): and it

(*h*) See 1 Saund. 73, 74 n. See form of affidavit, Chit. Forms, 669.

(*i*) See form of rule, Chit. Forms, 669; and see R. H. 2 W. 4, r. 103; R. T. 49 G. 3; 11 East, 273; 1 Chit. Rep. 691.

(*k*) Impey, K. B. 271.

(*l*) *Asplin v. Gray*, 1 Str. 211.

(*m*) *Wood v. Winch*, Barnes, 480;

*Thomeur v. Rand*, Id. 406; *Hagyard v. Wells*, Id. 409.

(*n*) *Smith v. Walker*, 8 Taunt. 169, 2 Moore, 64, S. C.; *Wigley v. Dubbins*, 4 Bingh. 344. See *Moses v. Stevenson*, 1 Taunt. 58.

(*o*) Id.

(*p*) See *Foster v. Taylor*, 1 R. T.

may be made after time has been obtained to plead, though upon terms of pleading issuably (*q*), unless expressly provided against by the order, or unless the order be upon "the usual terms" (*r*), or unless a trial would be lost by the changing (*s*). A defendant under terms of taking short notice of trial in Michaelmas or Easter Term, cannot move to change the venue (*t*). Nor can the motion be made by defendant after a new trial granted (*u*).

If the cause of action be such, that the above affidavit cannot be made, the Court will not order the venue to be changed, unless under very particular circumstances, or by the consent of parties. Therefore, if the cause of action have arisen in two counties, as in an action for a libel published in two or more counties (*x*), or written in one and published in another county (*y*), the Court will not change the venue (*z*); but where the libel was written and published in one county (*a*), or written here and published in Germany (*b*), the Court allowed the venue to be changed to the county where the libel was written. In an action for criminal conversation, the Court have allowed the venue to be changed, upon the above affidavit (*c*); so in an action for an assault (*d*), or for negligence in driving, &c. (*e*). So the venue may be changed in all actions upon contracts not under seal (*f*), with the exception of actions on bills of exchange and promissory notes (*g*), and also except in an action on a charter party, or other instrument though not under seal (*h*), if the declaration be special on the written instrument (*i*). It cannot be changed in debt for rent (*k*), or on a specialty (*l*), or in an action on an award (*m*), or in covenant (*n*). Yet in covenant, where a view was necessary, the Court allowed the venue to be changed to the county in which the premises were situate (*o*), though in another case it was refused (*p*).

781; *Mylock v. Saladine*, 3 Bur. 1564; *Bayley v. Beuumont*, 11 Moore, 304; and see cases cited in notes, *post*, 728.

(*q*) *Rowley v. Allen*, Willes, 318; *Wilson v. Harris*, 2 B. & P. 320.

(*r*) *Russell v. Hirst*, 1 C. & M. 184; *Waring v. Holt*, 3 Price, 3; *Brettargh v. Dearden*, M'Clel. & Y. 106; *Notts v. Curtis*, 1 Dowl. P. C. 319, 2 C. & J. 345, S. C.

(*s*) *Shipley v. Cooper*, 7 T. R. 698; *Petgt v. Berkeley*, Cowp. 511; and see *Ford v. Guiner*, Sayer, 207; *Nun v. Taylor*, 1 Bingh. 186.

(*t*) *Gitton v. Randell*, 1 M. & R. 142. (*u*) *Palmer v. Marshall*, 1 Dowl. P. C. 256, 1 M. & Scott, 252, 8 Bing. 155, S. C.

(*v*) *Pinkney v. Collins*, 1 T. R. 571; *Hobart v. Wilkins*, 1 Dowl. P. C. 460.

(*y*) *Clissold v. Clissold*, 1 T. R. 647; *Hitchon v. Best*, 1 B. & B. 299.

(*z*) See 2 Saund. 5e; *Neale v. Neville*, 6 Taunt. 665; *Cameron v. Gray*, 6 T. R. 363.

(*a*) *Freeman v. Norris*, 3 T. R. 306.

(*b*) *Metcalfe v. Markham*, 3 T. R. 652. But see *Walker v. Wright*, 4 East, 495.

(*c*) *Guard v. Hodge*, 10 East, 32.

(*d*) *Shepherd v. Hall*, 2 Chit. Rep. 417.

(*e*) *Williams v. Land*, 4 Taunt. 729. See *Flecke v. Godfrey*, 1 T. R. 782, n.

(*f*) *Kirk v. Broad*, Say. 7; *Howarth v. Willett*, 2 Str. 1100; *Watkins v. Towers*, 2 T. R. 275; *Roberts v. Wright*, 1 Dowl. P. C. 294, 1 C. & J. 547, 1 Tyr. 552, S. C., which was an action on an I. O. U. See *Morrice v. Hurry*, 7 Taunt. 306.

(*g*) *Pinkney v. Collins*, 1 T. R. 571; *Evans v. Weaver*, 1 B. & P. 20; *Shepherd v. Green*, 5 Taunt. 576; *Smith v. Elkins*, 1 Dowl. P. C. 426.

(*h*) *Morrice v. Hurry*, 7 Taunt. 306.

(*i*) *Pickard v. Featherstone*, 4 Bing. 39.

(*k*) *Duplessis v. Chalk*, 2 Str. 878.

(*l*) *Foster v. Taylor*, 1 T. R. 781; *Watt v. Daniel*, 1 B. & P. 425; and see *Anon.* 1 Sid. 87.

(*m*) *Whitburn v. Staines*, 2 B. & P. 355; *Stanway v. Hislop*, 4 D. & R. 635, 3 B. & C. 9, S. C.

(*n*) See *Weatherby v. Goring*, 3 B. & C. 552.

(*o*) *Hodinott v. Cox*, 8 East, 268.

(*p*) *Anon.* 2 Chit. 419.

And in other cases on specialties or written instruments, under special circumstances, the Court will change the venue after issue joined (*q*). There are some other cases also in which the Court will not allow the venue to be changed, unless upon very special grounds; as in actions for *scandalum magnatum* (*r*), actions against carriers (*s*), actions for the infringement of a patent (*t*), and actions for escapes or false returns (*u*). Also, where one defendant has allowed judgment to go by default, it may be doubtful if the Court would change the venue at the instance of the other defendant who had pleaded; for it might be imposing a hardship upon the former, to have damages assessed by a jury of a different county, without his assent (*x*).

Serjeants at law, barristers, attornies, and officers of the Court, have the privilege of laying their venue in Middlesex (*y*); and the Court will not allow the defendant to change it, even upon the usual affidavit (*z*); provided they sue in their own right, and not jointly with others. (See *ante* 630). But if they lay the venue in any other county, they have no privilege in retaining it (*a*). And none of the above persons can, as *defendants*, have the venue changed to Middlesex, without the usual affidavit (*b*).

But where a transitory action is brought in the county in which the cause of action arose, the Court will never change the venue, unless a fair and impartial trial cannot be had in the county where it is already laid (*c*); or unless the witnesses on both sides live at a great distance from the place where the venue is laid, or unless the expense of trying the cause in the county where the venue is laid greatly preponderates (*d*); or under other very special circumstances (*e*); or with the consent of parties (*f*). The affidavit to change the venue under special circumstances, should state the nature of the cause of action, and of the defence thereto, and the grounds for the motion (*g*). The application to change the venue on special grounds, in an action on a specialty, should, it seems, be made after issue joined (*h*).

(*q*) See cases referred to in notes, *infra*.

(*r*) 2 Ld. Raym. 1418; *Duke of Norfolk v. Alderton*, 2 Salk. 668; *Lady Fulconbridge v. Forrest*, 2 Str. 807.

(*s*) *Heathcote's case*, 2 Salk. 670.

(*t*) *Brumton v. White*, 7 D. & R. 103; *Anon.* 2 Chit. Rep. 418.

(*u*) *Anon.* 2 Salk. 668, 670.

(*r*) See *Eccles v. Holland*, 4 M. & Sel. 233; *Groves v. Thackery*, 5 Taunt. 631.

(*y*) Notwithstanding the 2 W. 4, c. 39, this privilege still exists, (*ante*, 630. Vol. 1, 31), but he must sue in person.

(*z*) *Pope v. Redfearne*, 4 Bur. 2027; 2 Show. 242, 176; *Burroughs v. Willis*, 2 Str. 822; *Knight v. Barnaby*, 2 Ld. Raym. 1253, 2 Salk. 670, S. C.; *Pye v. Leigh*, 2 W. Bl. 1065; *Doune v. Brian*, 1d. 993.

(*a*) *Lewis v. Shelley*, 7 Taunt. 146.

(*b*) *Yeardley v. Roe*, 3 T. R. 573; *Pope v. Redfearne*, 4 Bur. 2028; and see *Lewis v. Shelley*, 7 Taunt. 146.

(*c*) See *Mayor of Poole v. Bennet*, 2 Str. 874; *Petyt v. Berkeley*, Cowp. 510; *Rez v. Harris*, 3 Bur. 1333; *Mylock v. Saladine*, 1d. 1564; *Mayor, &c. of Bristol v. Proctor*, 1 Wils. 298.

(*d*) *Alcock v. Cork*, 6 Bingh. 733; and see *Foster v. Taylor*, 1 T. R. 781; *Evans v. Weaver*, 1 B. & P. 20; *Anon.* 2 Chit. Rep. 418; *Ladbury v. Richards*, 7 Moore, 82; *Fenwick v. Farrow*, 1 Chit. Rep. 334; *Crompton v. Stewart*, 1 Dowl. P. C. 567, 2 C. & J. 473, S. C.; 10 Price, 171.

(*e*) See *Foster v. Taylor*, 1 T. R. 782; *Hodinott v. Cox*, 8 East, 268; *Keys v. Smith*, 10 Bingh. 1; in which case defendant was a prisoner.

(*f*) *Mayor &c. of Bristol v. Proctor*, 1 Wils. 298.

(*g*) *Ladbury v. Richards*, 7 Moore, 82. See a form, Chit. Forms, 670.

(*h*) *Weatherby v. Goring*, 3 B. & C. 552, 5 D. & R. 441, S. C.

In local actions, when an impartial trial cannot be had in the county where the action is brought, instead of moving to change the venue, it is more usual to apply for leave to enter a suggestion upon the issue, in order to have a trial in the adjoining county, as directed *Vol. 1, 217 (i)*.

*Into what counties.*] When the venue is changed upon the common affidavit, it is always changed to the county in which the cause of action arose; when changed, because a fair and impartial trial cannot be had in the county in which it is laid, it is usually changed to the next adjoining county; when changed for any other special cause, it is changed into such county as the circumstances of the case suggest. It may be changed to Chester (*j*), Durham, or Lancaster, and the record sent down by *mittimus* into the two latter counties. The venue might, even before the 1 *W. 4, c. 70*, be changed to a Welsh county (*k*); and if it be desired afterwards to have the cause tried in the next English county, it might be done by a suggestion upon the issue, as directed *Vol. 1, 217 (l)*. So it may be changed to a city; after which the party may on motion have a *venire* to the sheriff of the next adjoining county (*m*). In Michaelmas or Hilary term, however, the Court will not in general change the venue to a county where there are no spring assizes (*n*), unless with the consent of parties, or under special circumstances (*o*).

*How and in what cases brought back.*] The plaintiff, however, may retain or bring back the venue in the county in which he has already laid it, by undertaking to give material evidence of some matter in issue, arising in such county. (*R. H. 2 W. 4, r. 103*). But where the venue was laid in London, and removed to Staffordshire on the usual affidavit, that the cause of action arose in Staffordshire only, the court refused to let the venue be brought back, on an affidavit that the cause of action arose, partly in Staffordshire and partly in Worcestershire, that a material witness for the defendant resided in London, and the plaintiff undertaking to give material evidence arising in Staffordshire or Worcestershire (*p*). *The application in this case is to discharge the rule to change the venue, and is made as directed ante, 726, as to the latter rule (q)*. The application should in strictness be made before the venue has been altered in the issue under the rule to

(i) See *Rex v. Harris*, 3 Bur. 1330; *Mayor &c. of Bristol v. —*, 1 Wils. 77.

(j) *Godfrey v. Philpot*, 2 Ld. Raym. 1418; *Price v. Griffith*, 1 Wils. 222; which cases were decided before the 1 *W. 4, c. 70*.

(k) *Hopkins v. Lloyd*, 6 East, 355.

(l) See *Freeman v. Gwyn*, 2 W. Bl. 962.

(m) *Bird v. Morse*, 7 Taunt. 385.

(n) See *Moore v. Fownhaugh*, 1 Wils.

138, 2 Str. 1258, S. C.; *Howarth v. Willett*, 2 Str. 1180; *Jeremath v. Ridley*, Barnes, 490; *Bird v. Morse*, 7 Taunt. 385.

(o) See *Fenwick v. Farrow*, 1 Chit. Rep. 334; *Id.* 14.

(p) *Wood v. Perkes*, 2 B. & Ald. 618. See *Powel v. Rich*, 7 Taunt. 178, *semb. cont.*

(q) See form of rule, Chit. Forms, 669.

change the venue (*r*); yet the Court have allowed it, even after the cause has been carried down to trial, and been made a *remanet* (*s*). In practice, however, it is usual to apply for this rule, as soon as the rule to change the venue has been served.

If the plaintiff fail in doing that which he has undertaken, namely, to give material evidence at the trial of some matter in issue arising in the county where the venue is laid, he shall be nonsuited (*t*). But it will be sufficient if, for instance, it be proved that the deed upon which the action is founded was enrolled within the county (*u*); or, in an action by the assignees of a bankrupt, to prove that the fiat of bankruptcy issued, and the bankruptcy was declared, in the county (*w*); or to prove that letters containing the promise on which the action is founded were put into the post-office in the county (*x*); or to prove in an action for an escape, the issuing of the writ on which the party was taken (*y*); or to prove any other fact material to the cause that took place in the county, though it do not go to the whole cause of action (*z*); or in an action against coach proprietors, for negligence and injuring plaintiff, to prove that expense of medical attendance, &c. was incurred in the county (*a*); or, it seems, to prove that the cause of action arose abroad (*b*), or in an action in Middlesex, to prove a payment of money into court, even although the money were paid in after the rule to retain the venue was obtained (*c*). But the undertaking in this case must be understood to have reference only to the evidence necessary to support the declaration; and, therefore, if the defendant confess and avoid the whole cause of action, or plead a tender to the whole declaration, the plaintiff will not be bound to produce at the trial the material evidence he undertook to give (*d*).

The Court will, however, under very special circumstances, discharge the rule to change the venue, without the undertaking above mentioned. Thus, when a fair and impartial trial cannot be had in the county to which it has been changed (*e*), or where the plaintiff would otherwise fail in the action (*f*), or if the cause of action arose either wholly or in part in a foreign country (*g*), or if the affidavit upon which the venue was changed be defective (*h*), or the like, the Court will discharge the rule to change the venue, without any undertaking. In all other cases, however, such undertaking will not be

(*r*) 1 Crompt. 114.

(*s*) *Bruckshaw v. Hopkins*, 1 Cowp. 409. See *Dickinson v. Fisher*, 2 Str. 858; Price, Notes, P. Pr. 177.

(*t*) *Santler v. Heard*, 2 W. Bl. 1031. See *Watkins v. Towers*, 2 T. R. 281.

(*u*) *Peake*, Ev. 213.

(*v*) *Kensington v. Chantler*, 2 M. & Sel. 36. See *Clarke v. Reed*, 1 New Rep. 310, *contra*.

(*x*) *Smith v. Walker*, 8 Taunt. 169.

(*y*) *Neale v. Neville*, 6 Taunt. 565.

(*z*) *Anon.* 2 Chit. Rep. 418.

(*a*) *Curtis v. Drinkwater*, 2 B. & Adol. 169.

(*b*) *Gerard v. De Roebeck*, 1 H. Bl. 280; *Neale v. Nevill*, 6 Taunt. 565.

(*c*) *Watkins v. Towers*, 2 T. R. 275.

(*d*) *Cockerell v. Chamberlayne*, 1 Taunt. 518; and see *Soulby v. Lea*, 3 Taunt. 86.

(*e*) *Petyt v. Berkeley*, 1 Cowp. 510; *Doe, lease of Hardman, v. Pilkington*, 4 Bur. 2447.

(*f*) *Amner v. Cattell*, 5 Bing. 208, 2 M. & P. 367, S. C.

(*g*) *Hope v. Bennett*, 2 N. R. 397; *M'Clure v. M'Keand*, 2 Taunt. 197.

(*h*) *Tidd*, 610; *Allen v. Griffiths*, 3 T. R. 495.

dispensed with, even although it be shewn that the affidavit upon which the venue was changed is false (*i*).

*In what cases changed by plaintiff.*] In transitory actions, the plaintiff may lay his venue where he will; but if from circumstances he should afterwards desire to change it, he may obtain leave to amend his declaration, by altering the venue (*j*), upon stating to the court a reasonable ground for the application (*k*); and this even after plea pleaded and issue joined (*l*), or even after the venue has been changed on the usual affidavit (*m*), or after a nonsuit on the trial, where it had been changed by plaintiff (*n*). In local actions we have seen, *ante*, Vol. 1, 217, that the Court or a Judge may allow the trial or enquiry to take place in another county than that in which the venue is laid.

(*i*) *Price v. Woodburne*, 6 East, 433; *Hunt v. Bridgeford*, 1 Taunt. 259; *Dick v. Norrish*, 3 Id. 464; *Poore v. Rich*, 7 Id. 178; *Wood v. Perkes*, 2 B. & Ald. 618; but see *Cailland v. Champion*, 7 T. R. 205.

(*j*) *Stroud v. Tilly*, 2 Str. 1162; *Petre*

*v. Craft*, 4 East, 433; *Dover v. Mestrey*, Id. 435.

(*k*) *Ayres v. Buxton*, 6 Taunt. 408.

(*l*) *Cook v. Shone*, Barnes, 12; but see *Bird v. Foster*, Id. 19.

(*m*) *Rivet v. Cholmondeley*, 2 Str. 1262.

(*n*) *Price's Notes*, p. Pr. 177.



## CHAPTER VII.

## STRIKING OUT COUNTS, &amp;c.

IF the declaration contain any unnecessary counts which may be productive of any great additional expense to the defendant, the court, upon his application, or a Judge at chambers, will order them to be struck out; and, if such counts appear to have been introduced for the purpose of vexation or the like, the Court will order the plaintiff to pay the costs of the application (a). Before applying to the Court, the defendant had better request the plaintiff's attorney to strike out the unnecessary matter, or the Court would not, in most cases, allow the defendant the costs of the application (b). That such counts are superfluous, however, must appear either from the declaration itself or from the bill of particulars. In an action by an attorney, where the declaration contained two counts for work and labour by him as an attorney, and two counts for work and labour generally, the Court ordered two of these counts to be struck out as superfluous (c). But if the several counts of a declaration contain really distinct causes of action (as where a declaration on a penal statute contained 480 counts for different penalties) (d), the Court will not order any of them to be expunged, at least not unless the defendant undertake to permit the matter of the counts struck out to be given in evidence under the counts retained (e). And where the counts do not appear on the face of them to be superfluous, the Court will not order them to be struck out merely on the ground that the causes of action are not included in the particulars of plaintiff's demand (f).

Or, if any part of a count be superfluous, such as unnecessary recitals, statements of title, descriptions of property, or the like, if the superfluous matter be of any length, the Court upon application, or a Judge at chambers, will, in like manner, order it to be struck out (g). In an action against forty-six defendants, the Court ordered the word "defendants" to be substituted for the names of the several defendants in the declaration, in all the places where they occurred, excepting the first (h).

(a) 1 Sellon, 239; *Newby v. Mason*, 1 D. & R. 508.

(b) *Draper v. Sangster*, MS. K. B. 20th Nov. 1829.

(c) *Meeke v. Orlade*, 1 N. R. 289; *Gabell v. Shaw*, 1 D. & R. 171, 2 Chit. Rep. 299, S. C.; *Brindley v. Dennett*, 2 Bingh. 184, 9 Moore, 358, S. C.; *Anon.* 1 Chit. Rep. 449, (a); *Nelson v. Griffiths*, 9 Moore, 785, 2 Bingh. 412, S. C.; and see *Wilkins v. Perry*, Hardw. 129.

(d) Tidd, 9th ed. 616; and see *Lane v. Smith*, 3 Smith, 113.

(e) *Carmack v. Gundry*, 3 B. & Ald. 272, 1 Chit. Rep. 709, S. C.

(f) *Nicholl v. Wilton*, 7 Chit. Rep. 448; *Bagley v. Watkins*, Id. 450.

(g) 1 Sellon, 239; Tidd, 617; *Dundas v. Lord Weymouth*, Cowp. 665; *Price v. Fletcher*, Id. 727.

(h) *Meeke v. Orlade*, 1 N. R. 289.

So, if a declaration unnecessarily contain indecent or scandalous language, the Court, upon application, will refer it to the master, and direct him, if he report against it, to tax exemplary costs (i).

The rule granted in these cases is either that the declaration be referred to the master, (upon whose report the Court will afterwards decide), or a rule upon the plaintiff to shew cause why the superfluous matter should not be struck out. It is seldom referred to the master (k), unless in the case of scandal and impertinence, or where the superfluous matter is so mixed up in the declaration as not to be easily separated and distinguished, or pointed out with distinctness to the attention of the Court. The motion should be made before plea pleaded; and, from one case it appears that it ought to be made before the defendant has obtained time to plead (l); and, at all events, before the superfluous counts are engrossed on the record (m). It is not, however, uncommon in practice to grant the application though made after time to plead granted.

We have already seen, *ante*, Vol. 1, 189, that there are prescribed (by R. T. 1831) forms of declarations in actions on bills of exchange, notes, and for the common counts, and that they must not exceed the prescribed length, otherwise no costs of the excess will be allowed plaintiff if he succeed, and the costs of the excess incurred by the defendant will be taxed and allowed him, and be deducted from the plaintiff's costs; and, on the taxation of costs between attorney and client, no costs will be allowed the attorney in respect of such excess; and in case any costs be payable by plaintiff to defendant on account of such excess, the amount thereof will be deducted from the attorney's bill.

The Court will seldom order *pleas* to be struck out as superfluous, particularly in cases of nicety or difficulty (n), if they be such as are allowed to be pleaded together by the practice of the Court, and are not pleaded for the purpose of vexation, or the like. (See further, Vol. 1, p. 203, 204). If the defendant plead *nil debet* to debt on specialty, the Court or a Judge would order him to withdraw it, or give plaintiff leave to sign judgment (o). And where to an action on a bill of exchange the defendant pleaded a demurrable plea, which appeared to be a trick on the face of it, the Court of Common Pleas ordered it to be struck out on an affidavit of its falsehood, giving the defendant leave to plead *de novo*, and requiring him to try at the next sittings (p).

(i) *Anon.* 2 Wils. 20; Imp. B. R. 224.

(k) *Bagley v. Watkins*, 1 Chit. Rep. 450.

(l) *Wilkins v. Perry*, Hardw. 129. See *Law v. Williamson*, Imp. C. P. 6th ed. 170.

(m) *Thomas v. Jackson*, 2 Bingh.

453, 10 Moore, 152, S. C.

(n) See *Trickey v. Yeandall*, 1 Bingh.

60, 7 Moore, 351, S. C.

(o) MSS. Vol. 1, 204.

(p) *Jones v. Strudd*, 4 Bingh. 663, 1 M. & P. 643, S. C.

## CHAPTER VIII.

## CONSOLIDATING ACTIONS.

IN ordinary cases, if two actions be brought by the same plaintiff, at the same time, against the same defendant, for causes of action which may be joined, and the defendant be holden to bail in both, the Court, or a Judge at chambers, will compel the plaintiff to consolidate them, and to pay the costs of the application (a). On a rule to shew cause why the proceedings in thirty-seven actions of ejectment, brought against the occupiers of so many houses in Sackville-street, should not be stayed, and abide the event of a special verdict in another action upon the same title, Lord Kenyon said, it was a scandalous proceeding; that all the causes depended on the same title, and ought to be tried by the same record; and the rule was made absolute (b). So, three declarations against different persons for the same assault were ordered to be consolidated (c); but, in another and similar case, the application was refused (d). Where three actions were successively brought by the same plaintiff, against the same defendant, upon three promissory notes, which became due at different times, this Court refused to consolidate them (e). But in a late case it was held, that if a party sue on a bill of exchange, and, after the action is commenced, another bill accepted by the same defendant, of which the plaintiff is holder, is dishonoured, and he bring a second action on that, a Judge at chambers would, on application being made, direct the two actions to be consolidated (f). And it is a matter of discretion with the Court to order such actions to be consolidated; and they will always do so, if it appear that the actions were brought separately, for the purpose of vexation or oppression.

In actions upon policies of insurance, where several actions are brought upon the same policy, the Court, upon application of the defendants, and with the consent of the plaintiff, will grant a rule to stay the proceedings in all the actions but one, the defendants undertaking to be bound by the verdict in such action, and to pay the amount of their several subscriptions and costs if the plaintiff should recover; together with such other terms as the Court may think proper to impose upon them (g). Or, if the plaintiff refuse his consent,

(a) *Cecil v. Briggs*, 2 T. R. 639. See *Benton v. Praed*, 1 Smith, 423.

(b) 2 Sellon, 144; *Doe d. Pulteney v. Cavan*, Imp. K. B. 731; and see *Grimstone v. Burgers*, Barnes, 176; but see *Smith v. Crabb*, 2 Str. 1149, *contra*.

(c) *Prac. Reg.* 151; *Anon.* 1 Chit. Rep. 709, n.; Barnes, 341; and see *Key*

*v. Hill*, 2 B. & Ald. 598.

(d) *Catlin v. Elliott*, 1 Str. 420.

(e) *Mussenden v. O'Hara*, Tidd's Prac. 614.

(f) *Oldershaw v. Tregwell*, 3 C. & P. 58; *see quære*.

(g) Parke, *Introd*.

the Court will then grant time to plead in all the actions but one, until that one have been determined (h); and if determined in favour of the plaintiff, the other defendants may (if necessary) obtain a stay of proceedings in their several actions, upon payment of the amount of their subscriptions and costs.

When a consolidation rule has been entered into, though fresh evidence be discovered, the Court will not permit the plaintiff to try the other actions (i). But the Court, under circumstances, may open the consolidation rule, and try a second cause; if they do, they will in general extend to the second trial all such terms made compulsory on the party successful in the first cause, as are requisite for attaining the merits (k).

Where the defendants pay money into Court, in several actions which are consolidated, and the plaintiff, without taxing the costs, proceeds to trial on one and fails, he will, nevertheless, be entitled to the costs in the other actions up to the time of the paying the money into Court. (*R. H. 2 W. 4, r. 104*) (l).

The application for the consolidation rule is to be made to the Court, or to a Judge. If made to the Court, as it had better be, if there be any thing out of the common way, draw up a motion paper, inserting thereon or in it the titles of the several causes; and indorse on it the counsel's name, requiring him "to move for a rule to shew cause why the within actions should not be consolidated." If made to a Judge, there is no need for a motion paper, and a summons will suffice, which should be intituled in the several causes, and be "for the plaintiff to shew cause why the within actions should not be consolidated." The rule is made absolute, or an order made, as above mentioned (m). After verdict for plaintiff, (if the actions have been consolidated by order) move to make the order a rule of Court; then move for a rule nisi for judgment, in the defended action, and also that judgment may be entered in the several other actions which were consolidated, and that the plaintiff be at liberty to sue out execution thereon; also, that the master may tax the costs in all the causes, and that the defendant may also pay the costs of the application to be taxed. Draw up the rule nisi, and serve a copy of it on the defendant's attorney; and if afterwards made absolute, and not complied with, sign judgment, tax your costs, and sue out execution, (according to the terms of the rule), as in other cases.

(h) Id.

(i) *Pullen v. Parry*, 1 Chit. Rep. 309, n.

(k) *Cohen v. Bulkeley*, 5 Taunt. 165.

(l) This rule alters the practice as laid down in *Burstell v. Horner*, 7 T. R. 372.

(m) See forms, Chit. Forms, 671.

## CHAPTER IX.

## PAYMENT OF MONEY INTO COURT.

WHEN a person is satisfied that he is indebted to another, but disputes the amount claimed of him, then, before action brought, he may tender to his creditor the sum which he thinks he really owes, or, after action brought, he may pay that sum into court, and let the plaintiff afterwards proceed in his action at his peril. But if neither the existence of the debt, nor the amount claimed be controverted, the defendant should apply to stay the proceedings, upon payment of debt and costs, as directed in the next chapter. In all cases where there has been a *tender*, but there is some doubt as to its sufficiency, it is safest to pay the money into court without pleading the tender: for, though the payment of money into court subjects the defendant to costs up to the time of paying it in, if the plaintiff do not proceed to trial, nevertheless, if the defendant plead a tender, and plaintiff take issue thereon, and the defendant fail in proving it, he will thereby, at all events, subject himself to the costs of the trial and the general costs of the cause. The payment of money into court shall be first considered.

*In what cases.]* The general rule, as the practice now exists, is, "that where the sum demanded is a *sum certain*, or capable of being ascertained by *mere computation*, without leaving any other sort of discretion to be exercised by the jury," the defendant shall be at liberty to pay money into court (a). This rule is, indeed, likely to undergo a very material change from the recent enactment of 3 & 4 W. 4, c. 42, s. 21, by which the defendant may "in all personal actions, (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant,) by leave of any of the superior Courts where such action is pending, or a Judge of any of the superior Courts, pay into Court a sum of money by way of compensation or amends, in such manner and under such regulations, as to the payment of costs and the form of pleading, as the said Judges, or such eight or more of them as aforesaid, shall, by any rules or orders by them to be from time to time made, order and direct." Until, however, the Judges have made some general rule or order on this subject, it is conceived this enactment will not alter the previous practice.

As the practice at present exists, therefore, money may be paid into Court in *assumpsit*, where the breach is the nonpayment of mo-

(a) *Hallett v. East India Company*, 2 Bur. 1120.

ney (b), but not otherwise (c). In actions against carriers, indeed, where they have given a notice not to be accountable for goods beyond a certain amount, they are allowed to pay that amount into court (d); but they will not be allowed to pay money into court, in *assumpsit* for injuring the plaintiff's goods (e).

In debt on simple contract, the defendant may pay money into court (f); so, in debt for rent (g); so, in debt on a policy of insurance. (19 G. 2, c. 37, s. 7). But generally in debt on a record or specialty, he cannot; because in these cases the amount of the debt is ascertained, and cannot be varied from by the jury in their verdict (h): the defendant's only course in these cases is to apply to the Court or a Judge to stay the proceedings on payment of the debt or penalty and costs; as to which see the next chapter. If the declaration contain two counts, the defendant may, upon payment of the debt demanded in one of them, have the proceedings stayed as to that count, and let the plaintiff proceed if he will upon the other. (*See the next chapter*).

In covenant, where the breach assigned is the nonpayment of a sum of money, the defendant may pay money into court (i), but not otherwise (k).

In actions of trespass, the defendant cannot pay money into court (l), unless in actions against justices of peace, &c.; (*post*, 736); nor can this be done, even in trespass for mesne profits (m); nor in case (n) (except in an action against a carrier, &c. for the loss of a parcel (*infra*)); nor in trover, replevin, or ejectment. Yet, in trover, the court have in some cases allowed the defendant to bring into court the article for which the action was brought, and costs. So, in ejectment they allow the defendant, and in replevin the plaintiff, to bring into court the amount of the rent, for the nonpayment of which the ejectment is brought, or the distress was made, respectively. As in these cases, however, the parties pay in, not a part merely, but the entire sum pretended to be due, it will be more convenient to defer the consideration of them to the next chapter, where we shall have to treat of the application to stay proceedings upon payment of debt and costs, generally.

In actions against mail coach contractors, stage coach proprietors, or common carriers, for the loss of or injury to goods, the defendants may pay money into court as in ordinary cases. (1 W. 4, c. 68, s. 10).

In actions by executors or administrators, the defendant may pay money into court, as in ordinary cases (o).

(b) *Gregg's case*, 2 Salk. 596.

(c) *Strong v. Simpson*, 3 B. & P. 15. See 5 B. & Ald. 93.

(d) *Hutton v. Bolton*, 1 H. Bl. 299, n.

(e) *Faul v. Pickford*, 2 B. & P. 234.

(f) *M'Quillin v. Cox*, 1 H. Bl. 249.

(g) *Gregg's case*, 2 Salk. 596; Pr. Reg. 257.

(h) See *Leapidge v. Pongillonne*, 2 Str. 896.

(i) *Gregg's case*, 2 Salk. 596; *Hallett v. East India Company*, 2 Bur. 1120; *Wainwright v. Houghton*, Barnes, 262,

284; 19 G. 2, c. 37, s. 7.

(k) *Fullwell v. Hall*, 2 W. Bl. 837.

(l) *Squire v. Archer*, 2 Str. 906.

(m) *Holdfast v. Morris*, 2 Wils. 115.

(n) *White v. Woodhouse*, 2 Str. 787; *Squire v. Archer*, Id. 906; *Salt v. Salt*, 8 T. R. 47; *Bowles v. Fuller*, 7 T. R. 335; *Calvert v. Jolliffe*, 2 B. & Adol. 418.

(o) *Crutchfield v. Scott*, 2 Str. 796. See *Gregg's case*, 2 Salk. 596; *Bigland v. Robinson*, 3 Id. 105.

As to payment of money into court, in actions by the assignees of a bankrupt, when the defendant is sued within the time limited for the bankrupt to dispute the commission, &c., *see stat. 6 G. 4, c. 16, s. 93 (p)*

In actions against justices of peace, or against officers of the excise or customs, for any thing done by them in the execution of their respective duties, if they have not made a tender, or if they conceive the amends tendered to be insufficient, they may have leave to pay into court such sums of money as they shall think fit; and the same proceedings shall be thereupon had, as in other cases of paying money into court. (*See ante*, 693). The same privilege is given to commissioners of bankrupt, by *stat. 6 G. 4, c. 16, s. 43 (q)*.

If the defendant pay money into court, in a case where he is not allowed to do so, the plaintiff, by taking it out, will thereby waive the irregularity, and the effect of it will then be the same as if it had been paid in on a mere money demand (*r*).

If there be two or more counts in a declaration, and one of them be for a money demand, the amount of which may be ascertained by mere computation, such as above described, the defendant may pay money into court upon that count (*s*). So, in covenant, if several breaches be assigned, and one of them be the non-payment of money, the defendant may pay money into court upon that breach (*t*). Or if, in such a case, the money intended to be paid in be the whole amount demanded for the rent, &c. the defendant may apply to stay the proceedings on that count, upon payment of the sum therein demanded and costs, and that the plaintiff be at liberty to proceed upon the other counts, if he should think fit; and the same in debt on record, specialty, or statute. (*See the next chapter*). But the Court, it seems, will not allow a defendant to pay money into court upon some of the counts of a declaration, and demur to the rest (*u*).

It seems questionable whether one of several defendants alone can pay money into court. And the Court of Common Pleas have refused to allow one of three defendants, who alone appeared (one of the others having suffered judgment by default, and the other being outlawed), to pay money into court, even although he offered to pay all the costs up to that time (*x*).

*When and how paid in, and costs on.*] Money may be paid into court at any time before plea pleaded, as a matter of course; or after plea, upon obtaining a judge's order to withdraw the plea, in order to bring money into court, and replead it (*y*). You may pay the money into court on any one count of the declaration which may be applicable to the plaintiff's demand, and thus, (if the plaintiff has no fur-

(p) *See Arch. Bkt. L. 259.*

(q) *See Arch. Bkt. L. 10.*

(r) *Griffiths v. Williams*, 1 T. R. 710.

(s) *See Bailie v. Cazelet*, 4 T. R. 570.

(t) *Fullwell v. Hall*, 2 W. Bl. 837;

*allet v. East India Company*, 2 Bur. 1120.

(u) *Pr. Reg. 256*; 1 Sellon, 286.

(x) *Hay v. Panchiman*, 2 W. Bl. 1029.

(y) *Griffiths v. Williams*, 1 T. R. 710, 711; *Turton v. Wragg*, 2 Str. 1271. *See Day v. Edwards*, 1 Taunt. 491, and Vol. 1, 207.

ther demand), save the costs of the other counts, notwithstanding they may be also applicable to such demand: therefore, where in an action by payee against acceptor of a bill drawn by a third person, the defendant paid 10*l.* into court on the common counts; nothing more was due on the bill, and there had been no other account or transaction between the plaintiff and defendant; it was held that the payment on the account stated was an answer to the whole action, and that the plaintiff could not recover nominal damages on the special counts (z). *Leave to pay money into court is in all cases requisite; such leave may now be obtained by a side bar rule, though formerly a motion paper signed by counsel, and sometimes a special motion or an application to a judge was requisite, and it may be so now under circumstances. (R. H. 2 W. 4, r. 55). Make out a præcipe or memorandum of the rule you want. If you intend paying the money into court on some particular count or counts only, or on some particular part of a count, frame the præcipe or memorandum accordingly: then pay the money into Hoare's bank in Fleet-street, and get a receipt for it; take this receipt to the signer of the writs (a), who will thereupon give you his receipt; pay him 2*s.* 4*d.* and also 2*s.* if the sum paid in be under 10*l.*, or at the rate of 20*s.* per 100*l.* for any greater sum. (R. H. 5 J. 1). Then take this receipt and the præcipe or memorandum above mentioned to the clerk of the rules (b), who will draw up the rule (c); pay him 5*s.* 6*d.* and serve a copy of it on the plaintiff's attorney.*

If interest be due, you should calculate it up to the time of the payment into court, and not merely to the commencement of the action (d).

If the defendant find that he has not paid a sufficient sum of money into court, the Court or a Judge might be induced to allow him to pay a further sum in, upon payment of costs (e).

Besides the money thus paid into court, the defendant (by the rule) must undertake to pay costs, to be taxed by the master, if the plaintiff accept the money so paid in and do not proceed in his action; and, in case of non-payment, to suffer the plaintiff either to move for an attachment on a proper demand and service of the rule, or to sign final judgment for nominal damages. (R. H. 2 W. 4, r. 56). In a case in this court, although it appeared that a certain sum had been offered to the plaintiff before declaration, and refused, yet the Court would not allow the defendant to pay that sum of money into court after declaration, upon the terms of the plaintiff's being obliged to relinquish the costs of the declaration if he afterwards took the money out; they said that the defendant should have tendered the money and pleaded the tender (f). But where the conduct of the plaintiff

(z) *Early v. Bowman*, 1 B. & Adol. 889; and see *Churchill v. Day*, 3 M. & Ry. 71.

(a) In C. P. take it to the prothonotaries' clerk, or in Exch. to the clerk of the rules.

(b) Or in C. P. to the secondaries.

(c) See form, Chit. Forms, 674.

(d) *Kidd v. Walker*, 2 B. & Adol. 705,

1 Dowl. P. C. 331, S. C.

(e) But see *Swan v. Freeman*, Barnes, 282; Pr. Reg. 263, 262. See a form, Chit. Forms, 675.

(f) *Burmester v. Hüh*, 13 East, 551. See Pr. Reg. 258; *Gibbon v. Cope-man*, 5 Taunt. 840; but see *Zeewin v. Coucell*, 2 Taunt. 203; *Roberts v. Lambert*, Id. 283.



appeared to have been oppressive, and that the defendant was willing and offered to pay the money before action brought, the Court upon application of the defendant (even after he had paid the money into court), ordered that so much of the rule as obliged him to pay costs should be discharged (g). And in a recent case, where an action was brought for two separate sums of money, and the defendant, having offered to pay the amount of one of them, with costs up to that time, which was refused by the plaintiff, paid the amount into court; but the plaintiff afterwards finding that he could not maintain his action as to the second sum, took the money out of court, and proceeded no further: the Court, upon application, allowed the defendant his costs from the date of his offer to pay the sum afterwards paid into court, and directed these costs to be deducted from the costs of the plaintiff (h). And in a still more recent case, the defendant obtained a Judge's summons to stay proceedings, upon payment of a certain sum and costs; but the plaintiff claiming more than the sum offered, of course, no order was made, and the action proceeded; the defendant afterwards paid the same sum into court, and the plaintiff thereupon took the money out, and discontinued the action: the Court, upon application of the defendant, allowed the plaintiff his costs only up to the time of his attendance upon the summons, and ordered the costs subsequently incurred by the defendant, and the costs of the application, to be deducted from them,—even although it appeared that the plaintiff was induced from poverty to accept the money paid into court, and relinquish his action for the balance (i). Where, in a country cause, the defendant took out a summons before declaration to stay proceedings upon payment of a less sum than the plaintiff's demand and costs, upon which no order was made, and the defendant afterwards paid that sum into court, which the plaintiff's agent, having in the mean time consulted his principal in the country, took out of court, it was holden that the plaintiff, not having been guilty of fraud or vexation, was entitled to costs up to the time at which he took the money out of court (k). Where an order was made for the defendant to pay four guineas into court, but the plaintiff's agent refused to tax the costs under that order, the Court of Exchequer permitted the defendant to pay the money into court without an undertaking to pay the costs (l). Nor will the Court require this undertaking if the amount paid into court be under 40s., and it be satisfactorily shewn to be recoverable in a county court (m).

*Effect of it.*] By paying money into court, on the whole of a special declaration or on the special counts, the defendant impliedly acknowledges that the contract or other cause of action is as de-

(g) *Johnson v. Houlditch*, 1 Bur. 578.

(h) *James v. Raggett*, 2 B. & Ald. 776, 1 Chit. Rep. 471, S. C.; and see *Marryott v. Clapp*, 1 Dowl. P. C. 701.

(i) MS. T. 1825; and see *Jones v. Owen*, *infra*, note (m).

(k) *Haworth v. Holgate*, 2 Y. & J.

257.

(l) *Anon.* T. T. 1832, *Jervis's Rules*, 75.

(m) *Semble, Jones v. Owen*, Exch. T. T. 1832, *Jervis's Rules*, 75, 1 Dowl. P. C. 565, 2 C. & J. 476, S. C.

scribed in the declaration (*n*); and the only remaining question to be determined is the amount of the damages. By paying money into court on the common *indebitatus* counts, the defendant admits no more than that the sum paid in is due to plaintiff (*o*); and paying money into court on several counts, one of which only is applicable to the plaintiff's demand, admits a cause of action on that count only (*p*). As instances of these rules, if money be paid into court on a count on a bill of exchange, there is no necessity to prove the defendant's handwriting (*q*), and the sufficiency of the stamp is thereby admitted (*r*); so if paid in in an action of covenant, the execution of the deed is admitted (*s*); so, if paid in on a count on a guarantee, it admits an agreement signed according to the statute of frauds (*t*); so, where two breaches are assigned in one count, payment into court on one of the breaches is an admission of the whole contract as set out in that count, so as to enable the plaintiff to recover on the second breach without proof of the contract (*u*). Where the declaration states a contract to pay a particular sum of money for certain articles, payment of part of the money into court on the special count, by admitting the contract, admits also the sum originally due; and the only question is, whether the remainder of the money had been previously paid (*x*). And in an action for goods sold by sample at a stipulated price, the payment of money into court therein precludes the defendant from insisting on the inferiority of the goods (*y*). But where the declaration is for goods sold, to be paid for at the average price to be ascertained on a day specified, payment into court does not, it seems, admit the average price to be as stated in the declaration (*z*). The payment into court on a count on a valued policy, in which the loss is averred to be total, is no admission of a total loss (*a*). In an action for goods sold and delivered, it admits a contract, though the goods were tortiously converted by the defendant (*b*). But it is not such an admission as precludes the defendant from taking an objection to the *legality* of the contract, in order to prevent the plaintiff from recovering beyond the sum paid in (*c*); and if the declaration contain a legal and an illegal demand, the money paid in shall be applied to the legal demand only (*d*). So, in an action on a policy of insurance, the Court, under particular circumstances (as where the plaintiff misleads the defendant, and induces him to suppose that the only point to be tried is a question of fraud, &c.) allowed the defen-

(*n*) *Burrough v. Skinner*, 5 Bur. 264; *Guilford v. Nock*, 1 Esp. 347; *Seaton v. Benedict*, 5 Bingh. 28. See 13 East, 202; *Leggett v. Cooper*, 2 Stark. 103; *Everth v. Bell*, 7 Taunt. 450; *Stafford v. Clarke*, 2 Bingh. 377.

(*o*) *Seaton v. Benedict*, 5 Bingh. 20, 2 M. & P. 66, S. C.

(*p*) *Stafford v. Clarke*, 2 Bingh. 377, 9 Moore, 724, 1 C. & P. 703, S. C.; *Everth v. Bell*, 7 Taunt. 450, 1 Moore, 158, S. C.

(*q*) *Gutteridge v. Smith*, 2 H. Bl. 374.

(*r*) *Israel v. Benjamin*, 3 Camp. 40.

(*s*) *Randel v. Lynch*, 2 Camp. 357.

(*t*) *Middleton v. Brewer, Peake*, 15.

(*u*) *Dyer v. Ashton*, 1 B. & C. 3, 2 D. & R. 19, S. C.

(*x*) *Cox v. Brain*, 3 Taunt. 95.

(*y*) *Leggett v. Cooper*, 2 Stark. 103.

(*z*) *Stoveld v. Brewin*, 2 B. & Ald. 116; *Everth v. Bell*, 7 Taunt. 450.

(*a*) *Rucker v. Pulgrave*, 1 Camp. 557, 1 Taunt. 419, S. C.

(*b*) *Bennett v. Francis*, 2 B. & P. 560, 4 Esp. 28, S. C.

(*c*) *Cox v. Parry*, 1 T. R. 464.

(*d*) *Ribbans v. Crickett*, 1 B. & P. 264.

dant to give evidence of fraud, notwithstanding he had paid money into court (e). It is a conclusive admission, however, of the plaintiff's right to sue in the court in which the action is brought (f); and of his right to sue alone without joining another party (g); and of his right to sue in the character in which he sues (h). But it is no admission of the plaintiff's right of action beyond the sum paid into court (i); and, consequently, does not deprive the defendant of the benefit of the statute of limitations as to the residue of the plaintiff's demand (k).

If the plaintiff take the money out of court, and it amount to less than the sum stated in the affidavit to hold to bail, the plaintiff does not thereby subject himself to an action for a malicious arrest (l).

The plaintiff may be nonsuit after payment of money into court; (*ante*, Vol. I, 301); but it is doubtful whether the defendant can demur to evidence after it (m).

After the payment of money into court the defendant can never afterwards take it out, even although it was paid in by mistake (n). Yet the court, it should seem, if the plaintiff failed in his action, and the money had not been already taken out of court by him, would impound it to answer the defendant's costs (o).

*Proceedings after it.*] Where money has been paid into court the plaintiff may in all cases take it out, and then either accept it in satisfaction of his debt, or may proceed in his action, at his option (p). The only question is as to his right to costs. If he accept of the money paid in in satisfaction of his debt, he is entitled to costs to the time of paying it in. Even if he proceed in the action, after the money has been paid in, he may still, at any time before trial, (this even after a peremptory undertaking given and default made (q)), accept the sum so paid in, in satisfaction of his debt, and be entitled to costs to the time of paying the money into court, upon allowing the defendant his subsequent costs (r). But if he proceed to trial, and a verdict be given against him (s), or a juror be withdrawn (t), or he be

(e) *Muller v. Hartshorne*, 3 B. & P. 556; and see *Mellish v. Alnut*, 2 M. & Sel. 106; *Andrews v. Pulgrave*, 9 East. 325; *Rucker v. Pulgrave*, 1 Camp. 557.

(f) *Miller v. Williams*, 5 Esp. 19.

(g) *Walker v. Rawson*, 1 M. & Rob. 250.

(h) *Lipscombe v. Holmes*, 2 Camp. 441.

(i) 2 Esp. 482, n.; *Blackburne v. Schoales*, 2 Camp. 341; *Rucker v. Pulgrave*, 1 Taunt. 419; *Everth v. Bell*, 7 Id. 450; *Steward v. Brewin*, 2 B. & Ald. 116.

(k) *Long v. Greville*, 4 D. & R. 632, 3 B. & C. 10, S. C.

(l) *Jackson v. Burleigh*, 3 Esp. 34. See *Hulyard v. Blowers*, 5 Esp. 69; *Butler v. Brown*, 1 B. & B. 66, 3 Moore, 327, S. C.; but see *Laidlaw v. Cockburn*, 2 New Rep. 76.

(m) *Jenkins v. Tucker*, 1 H. Bl. 93.

(n) *Vaughan v. Barnes*, 2 B. & P. 392; *Malcolm v. Fullarton*, 2 T. R. 645. See *Ward v. Lowring*, 2 Smith, 49; *Knapp v. Drew, Barnes*, 279; *Crockay v. Martin*, Id. 281; *Vane v. Mitchell*, Id. 284; *Brough v. Adcock*, 1 Dowl. P. C. 231, 5 M. & P. 678, 7 Bligh. 650, S. C.

(o) See *Anon. Barnes*, 280.

(p) See *Gregg's case*, 2 Salk. 597.

(q) *Foulstone v. Blackmore*, 1 Y. & J. 213; *Seamore v. Bridge*, 8 T. R. 408.

(r) *Hartley v. Bateson*, 1 T. R. 629; *Griffiths v. Williams*, Id. 710; *Davis v. Mansell, Willes*, 191; but see *James v. Raggett*, 2 B. & Ald. 776, 1 Chit. Rep. 471, S. C., and *ante*, 740.

(s) *Stevenson v. Yorke*, 4 T. R. 10; but see *Wilton v. Place*, 2 B. & P. 56; *Muller v. Hartshorne*, 3 Id. 556; *Tuomlin v. Brock*, 2 Taunt. 361; *Jeffs v. Smith*, 4 Id. 196.

(t) *Stodhart v. Johnson*, 3 T. R. 657.

nonsuit; or even if the defendant obtain judgment as in case of a nonsuit (u); he will not be entitled to costs to the time of paying the money into court. It may be necessary to observe, however, that if the money have been paid in on one count only of the declaration, the plaintiff (if he accept of the money so paid in) will be entitled to the costs of that count only, and not of the others (x): and if the money be paid into court on any one count, which may be applicable to the plaintiff's demand, and the plaintiff has no further demand, he will proceed at his peril of costs on the other counts, notwithstanding they may be also applicable to the demand (y). Where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial in one and fails, he will, by a recent rule, nevertheless, be entitled to the costs on the others up to the time of paying the money into court. (*R. H. 2 W. 4, r. 104*).

If the plaintiff proceed to trial, and do not prove a debt or damages beyond the amount of the sum paid into court, he shall (upon the defendant's producing the rule (z),) be nonsuit, or have a verdict against him, and be liable to costs as in other cases (a).

But if he wish to discontinue the action before trial, having proceeded in it after the money was paid in, let him move for a rule to shew cause why the master should not be directed to tax the costs of the plaintiff to the time of paying the money into court, and the defendant's costs from that time to the time of making the present application, and why the defendant should not pay the balance to the plaintiff (b).

Or if he wish to accept the money paid into court, in satisfaction of his debt, without proceeding in the action, let him first take the money out of court, thus: *Get a copy of the rule at the rule office; and take it to the signer of the writs, who will thereupon pay you the money. Then get an appointment from the master, on the copy of the rule, to tax costs, and serve the same on the defendant's attorney.* (*R. M. 31 G. 3*). *Attend accordingly before the master, and have the costs taxed; and if the defendant do not pay them, then, in pursuance of the defendant's undertaking in the rule for paying the money into court, make a personal service of a copy of the rule, with the master's allocatur thereon, and shew the rule itself at the same time to him. and demand the costs as directed post, Part 3; and, if he do not pay them when thus demanded, the Court will grant an attachment against him, absolute in the first instance. (See Id.). Or, if the defendant do not pay the costs thus taxed, then the plaintiff may sign*

(u) *Crosby v. Olorenshaw*, 2 M. & Sel. 336; *Postle v. Beckington*, 6 Taunt. 158; but see *Seamour v. Bridge*, 8 T. R. 408; *Lorck v. Wright*, Id. 486.

(x) *Baillie v. Cazelet*, 4 T. R. 579; *Skarratt v. Vaughan*, 2 Taunt. 266.

(y) *Early v. Bowman*, 1 B. & Adol. 889; *Churchill v. Day*, 3 M. & Ry. 71; ante, 738.

(z) *Irrael v. Benjamin*, 3 Camp. 41; 1 C. & P. 21, n.

(a) *Griffiths v. Williams*, 1 T. R. 710; *Stevenson v. Yorke*, 4 T. R. 10; 1 Saund. 33 c.

(b) *Hartley v. Bateson*, 1 T. R. 629. See *James v. Raggett*, 2 B. & Ald. 776, 1 Chit. Rep. 471, S. C.; and ante, 740.

final judgment for nominal damages, and issue execution for the costs, as in other cases. (See *R. H. 2 W. 4, r. 56*). If the plaintiff take the money out of court, and do not serve the appointment as above mentioned on the defendant's attorney, it is to be considered that the plaintiff intends to proceed in the action, to recover a larger sum than that paid into court. (*R. M. 31 G. 3*).

Proof of the payment of money into court does not, it seems, entitle the plaintiff to reply at the trial (*c*).

*Payment of money into court upon a plea of tender.*] If you intend to plead a tender, pay the money tendered into court, in the manner directed *ante*, 739, and get a receipt for it in the margin of the plea, from the signer of the writs. But a tender and refusal may be pleaded to an avowry or cognizance for rent or damage feasant, without bringing the money into court; for, if the distress be not rightfully taken, the defendant must answer to the plaintiff his damages (*d*); and it may be pleaded in this way to an action for an involuntary trespass (*e*), or in actions against magistrates (*f*), or excise or custom officers (*g*). If the tender be pleaded only to a particular count, the rule for paying the money into court on it should express that it is upon that count only, otherwise it will have the same effect as a rule for payment of money into court without the plea of tender (*h*), and as to which see *ante*, 740, 741.

After paying money into court on a plea of tender, the defendant can never take it out, even although he have a verdict (*i*). But the plaintiff may take it out, whether he confess or deny the tender in his replication (*k*).

If the defendant plead a tender, without paying the money into court, the plea may be treated as a nullity. (*Vol. 1, 204*).

*Payment of money into court in lieu of bail.*] As to this, see *ante*, *Vol. 1, 180*.

(c) 2 Taunt. 267.

(d) Gilb. Rep. 83, 179.

(e) 3 Chit. Pl. 5th ed. 1066.

(f) Id. 1065; *ante*, 693.

(g) Id. 1063; *ante*, 693.

(h) *Bulwer v. Horne*, 4 B. & Adol. 132.

(i) *Cox v. Robinson*, 2 Str. 1027.

(k) *Le Grew v. Cooke*, 1 B. & P. 333.

## CHAPTER X.

## STAYING PROCEEDINGS.

*Upon payment of debt and costs.*] In an action for the recovery of a debt, we have seen, *ante*, Vol. 1, 108, that the copy of the process served must be indorsed with the amount of such debt, and of what the plaintiff's attorney claims for the costs of such process, arrest, or service and attendance to receive debt and costs; and upon payment of such amount, *within four days*, to the plaintiff or his attorney, further proceedings will be stayed; the defendant having the liberty of afterwards getting the costs taxed, and if taxed at one-sixth less than stated on the copy of the process, the plaintiff's attorney will have to pay the costs of taxation. (*R. H. 2 W. 4, r. 2.*) The payment of this amount, *within the four days*, will of itself operate as a stay of further proceedings: *after that time*, if the defendant dispute neither the cause of action nor the amount of the debt, he may, in the cases mentioned *infra*, stay further proceedings, by applying to a Judge by summons, and obtaining his order for such stay of proceedings upon payment of the debt and costs. But where the defendant *disputes the amount* of the debt claimed, and the nature of the claim be such that he may pay money into court on it, (as to which *see ante*, 736, 737), he should pay the sum actually due into court accordingly, and defend for the rest of the claim; or, if he cannot pay it, or the nature of the claim be such that he cannot pay money into court on it, then his course is either to plead to that part of the claim which he disputes, and, as to the residue, to allow judgment to pass against him by default, and have the damages ascertained by an inquest, or, in some cases, as on bills of exchange, &c. (*see ante*, 509), by a reference to the master. (*See the last Chapter*). And even in cases where the amount of the debt claimed is *disputed*, it is not unusual to obtain a summons, calling upon the plaintiff to shew cause why, upon payment of a certain sum, (namely, the sum actually due, or which you think he can recover,) and costs, the proceedings in the action should not be stayed. If, on attending before the Judge, the plaintiff's attorney refuse to receive the amount mentioned in the summons, pay it into Court; and if he afterwards take it out, and serve you with an appointment to tax the costs, move the Court, upon an affidavit of the facts, for a rule to shew cause, or apply to a Judge on a summons to shew cause, why the master should not tax the defendant's costs from the time of the service of the original summons, and the plaintiff's costs up to that time only, and why, after deducting the defendant's from the plaintiff's costs, upon payment of the balance due to the plaintiff, all further proceedings in the action should not be stayed; which will be ordered accordingly. (*See ante*, 739, 740).

Or, if the defendant's costs exceed the plaintiff's, then that the proceedings in the action be stayed, and that the plaintiff shall pay to the defendant, or his attorney, the balance, after deducting the amount of the plaintiff's from the defendant's costs. Where the defendant, after an application by the plaintiff's attorney, paid the plaintiff the debt demanded, without notice that a writ had been sued out, about which the plaintiff said nothing, and the attorney afterwards arrested defendant for the costs on a writ which had been sued out before the payment of the debt, the Court of Common Pleas ordered the proceedings to be stayed without costs (a). And, if the plaintiff's attorney has been guilty of gross misconduct, the Court will sometimes stay the proceedings on payment of the debt without costs (b).

It may be laid down as a general rule, that the defendant will be allowed to stay proceedings upon payment of debt and costs, in all cases where at common law he may pay money into court. (*See ante*, 736, 737).

Thus, in assumpsit for a money demand, the defendant may have the proceedings stayed upon payment of the sum demanded and costs (c). And where a sheriff levied under a *fi. fa.*, and the plaintiff brought an action for money had and received against him, for the amount of the money levied, without having previously made a demand of it, the Court upon application stayed the proceedings in the action, upon payment of the money levied, without costs (d). Where several actions are brought against the acceptor, indorsers, &c. of a bill of exchange, any of the parties, after judgment obtained in the action against him, may prevent execution from being sued out thereon, upon payment of the debt and costs; and, before judgment, the drawer or indorser of a bill of exchange, or the indorser of a promissory note, may stay the proceedings in the action against him, upon payment of the debt and the costs in that action; but the acceptor of a bill of exchange, or the drawer of a promissory note, cannot in general obtain a stay of proceedings before judgment, excepting upon the terms of paying, not only the debt and costs in the action against him, but also the costs in all the other actions against the indorsers, &c. (e). But where there is an attachment against the sheriff in an action against the acceptor, the sheriff will be relieved on payment of the costs of that action only (f). And in a late case, where, after the acceptor had offered to pay the debt and the costs of the action against himself, the plaintiff who was an attorney and indorsee of the bill, brought another action against the drawer, who was his own client, the Court stayed the proceedings upon payment of the debt and the costs of one action only (g). And the principle upon which this case was decided has been since acted on in several cases, where

(a) *Rooke v. Wasp*, 5 Bingh. 190, 2 M. & P. 304, S. C.

(b) *Adams v. Staton*, 1 Bingh. 69, 7 Moore, 365, S. C.; *ante*, 739, 740.

(c) *See Gibbon v. Copenan*, 5 Taunt. 840.

(d) *Jefferies v. Sheppard*, 3 B. & Ald.

696.

(e) *Smith v. Woodcock*, 4 T. R. 691. *Per Lord Tenterden*, in *Dawson v. Morgan*, 9 B. & C. 620.

(f) *Rex v. Sheriffs of London*, 2 B. & Ald. 192.

(g) *Hodson v. Gunn*, 2 D. & R. 57.

several actions have been brought against several, real or fictitious, parties to the bill, evidently for vexation and costs.

In debt on simple contract, the proceedings may be stayed upon payment of debt and costs. So, in debt for rent (*h*). So, in debt on bond in a penal sum, conditioned for the payment of a less sum, the defendant may bring into Court the principal and interest (*i*), and also, it seems, such costs as have been expended in any suit in law or equity concerning the same (*k*); which shall be deemed and taken to be in full satisfaction and discharge of the said bond. (4 & 5 A. c. 16. s. 13) (*l*). So, in debt on bond conditioned for the payment of an annuity, or of money by instalments, the defendant may obtain a stay of proceedings, upon payment of the arrears and costs, provided he give the plaintiff judgment in the action as a security for the future payments (*m*), but not otherwise (*n*); but where the bond was conditioned for the payment of a sum in gross, and by a subsequent agreement that sum was to be paid by instalments, the Court would not stay proceedings on the bond upon payment of the instalment, but required the defendant to pay in the whole sum mentioned in the condition of the bond, with costs (*o*); and the same where it was expressly stated in the bond that the whole sum should become due, upon default made in the payment of any one instalment (*p*). In these cases, the application is for a rule to shew cause why it should not be referred to the master to compute the principal and interest due upon the bond, (or as the case may be); and why, upon payment of such sum with costs to be taxed, &c. the proceedings in the action should not be stayed. So, in debt on bond conditioned to perform covenants, or for the performance of any specific act, the defendant may obtain a stay of proceedings, upon payment of the penalty of the bond and costs. (*Ante*, 523). So, in debt on bond conditioned for the payment of mortgage money, or for the performance of covenants in a mortgage deed, where no suit for foreclosure or redemption is depending, a payment to the mortgagee, or, in case of his refusal, a payment into court, of principal and interest due on the mortgage, and costs, shall be deemed to be in full satisfaction of the mortgage, and the Court shall discharge the mortgagor of and from the same accordingly. (7 G. 2, c. 20, s. 1) (*q*). As to staying proceedings in debt on bail bond, see Vol. 1, 146. So, in debt on judgment, the Court will stay proceedings, upon payment of the sum recovered by the judgment and costs (*r*). As to staying proceedings against bail upon their recognizance, see Vol. 1, 415,

(*h*) *Lee v. Irish*, Hardw. 173.

(*i*) See *Farquhar v. Morris*, 7 T. R. 124; *Hogan v. Page*, 1 B. & P. 337.

(*k*) *Lock v. Shermer*, Hardw. 116: see *vide Stacey v. Nevinsam*, 2 Str. 699.

(*l*) See *Bonafous v. Rybot*, 3 Bur. 1373; *Lord Lonsdale v. Church*, 2 T. R. 388; *Wilde v. Clarkson*, 6 T. R. 303.

(*m*) *Darby v. Wilkins*, 2 Str. 957; *Bridges v. Williamson*, 1d. 814; *Bonafous v. Rybot*, 3 Bur. 1370.

(*n*) *Vansandau v. —*, 1 B. & Ald.

214; *Tighe v. Crafier*, 2 Taunt. 387. See *Steel v. Bradfield*, 4 Taunt. 227; *Macdonald v. Paulley*, 1 B. & P. 161.

(*o*) *Bonafous v. Rybot*, 3 Bur. 1374.

(*p*) *Gowlett v. Hanforth*, 2 W. Bl. 988.

(*q*) See *Goodtitle d. Taysum v. Pope*, 7 T. R. 106; *Berthen v. Street*, 8 Id. 326; *Skinner v. Stacy*, 1 Wils. 80.

(*r*) See *Simpson v. Stone*, 2 W. Bl. 785.



416. So, in debt on statute for a penalty, the proceedings may be stayed upon payment of the penalty and costs (*s*); or, if the action be for several penalties, the defendant may have the proceedings upon one or more of the counts stayed, upon paying into court the penalties claimed in such counts, and allowing the plaintiff to proceed upon the other counts if he wish it.

In covenant, where the breach assigned is the non-payment of money, proceedings may be stayed, upon payment of the amount claimed and costs.

In trespass and case, the Court will not stay the proceedings, upon payment of a sum of money and costs, not even in the action of trespass for mesne profits; because the damages in these cases cannot be ascertained without the intervention of a jury (*t*). Yet, in one case, under particular circumstances, the Court ordered the proceedings to be stayed in an action of trespass, upon the defendant's restoring the goods seized, or paying the full value of them, with costs (*u*); but this is a very rare instance. In trespass and case, therefore, if you cannot deny the cause of action, you should allow judgment to go by default, and let the damages be ascertained upon a writ of inquiry.

In trover for money, the Court will allow the money claimed by the declaration to be paid into court, and let the plaintiff afterwards proceed in the action at his peril (*x*); or they will stay the proceedings, perhaps, upon payment of such sum with interest and costs, if there be no circumstances in the case calculated to enhance the damages beyond the mere interest. So, in trover for a specific chattel, when the chattel is of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, the Court will allow such chattel to be brought into Court, or will order it to be delivered to the plaintiff, and let him afterwards proceed in the action at his peril as to costs, in the same manner as upon payment of money into court (*y*); or perhaps they would grant a rule, calling upon the plaintiff to shew cause why, upon delivery to him of the goods in question, and upon payment of costs, all proceedings in the action should not be stayed (*z*). Where trover was brought for title-deeds, and a writ of inquiry executed, the Court permitted satisfaction to be entered on the roll, upon the terms of the defendant's delivering up the deeds, &c., paying costs as between attorney and client, and putting the plaintiff in the same situation as before action brought, &c. (*a*).

In replevin of a distress for rent, the plaintiff may have leave to

(*s*) *Webb v. Punter*, 2 Str. 1217; *Stock v. Eagle*, 2 W. Bl. 1052; and see *Rex v. Strong*, 1 Bur. 431.

(*t*) See *Squire v. Archer*, 2 Str. 906; *Bowles v. Fuller*, 7 T. R. 335; *Holdfast v. Morris*, 2 Wils. 115; *Bernasconi v. Fairbrother*, 7 B. & C. 379.

(*u*) *Pickering v. Trustee*, 7 T. R. 53.

(*x*) *Anon.* 1 Str. 142.

(*y*) *Rex v. Clarke*, 3 Bur. 1364; *Ca.*

*Pr. C. B.* 59; *Pickering v. Trustee*, 7 T. R. 53. See *Catling v. Bowling*, Say. 80; *Harding v. Wilkin*, Id. 120; *Bowington v. Parry*, 2 Stra. 822; *Olivant v. Permeau*, Id. 1191; *Olivant v. Berino*, 1 Wils. 23; *Earl v. Holderness*, 4 Bing. 462, 1 M. & P. 254, S. C.; *West v. Taunton*, 4 M. & P. 79, 6 Bingh. 400, S. C.

(*z*) *Ca. Pr. C. B.* 130.

(*a*) *Coombe v. Sansom*, 1 D. & R. 201.

pay the rent claimed into Court (b); or, upon application of the defendant, the Court will stay the proceedings, upon payment of the costs of the action and the costs of replevying, and upon giving up the replevin bond, if no special damage be stated in the declaration (c).

In ejectment for non-payment of rent, if the tenant or his assignee (or the mortgagee of the term (d),) shall, at any time before trial (e), or at any time before execution, after a judgment against the casual ejector (f), pay or tender to the landlord, or pay into court, all the arrears of rent and costs (g), all further proceedings shall cease. (4 G. 2, c. 28, s. 4, ante, 562). The application is to the Court in term time, or to a Judge at chambers in vacation (h). If the lessor of the plaintiff, however, have any other title to the premises than that arising from the non-payment of rent, he is not prevented by this rule from proceeding in the action upon such title. So, in ejectment by mortgagee, where no suit in equity for foreclosure or redemption is depending, if the person, having a right to redeem, shall, at any time pending the action (i), pay to the mortgagee, or, in case of his refusal, pay into Court, the principal and interest due on the mortgage, with such costs as have been expended in any suit at law or in equity on such mortgage, (such money for principal, interest, and costs, to be ascertained by the Court where such action is pending, or by its officer), it shall be deemed and taken to be in full satisfaction of the mortgage, and the Court shall discharge the mortgagor of and from the same accordingly, and order a reconveyance, &c. (7 G. 2, c. 20, s. 1). This, however, does not extend to cases where the right of redemption is controverted, or the money due is not adjusted; nor shall it prejudice any subsequent mortgage. (Id. s. 3) (j). The defendant is entitled to have the proceedings stayed, under this statute, without paying any bygone interest, or the expense of preparing the mortgage deed, or any assignment of it (k). The application for this purpose may be made to the Court in term time, or to a Judge in vacation (l).

Where there are two or more counts in a declaration, and any one of them be for a demand of a sum certain, such as is above described, the defendant may obtain a stay of proceedings as to that count, upon payment of the sum of money therein demanded; and the plaintiff may proceed on the other counts if he wish it. Formerly, if the plaintiff did not proceed on the other counts, the defendant,

(b) *Gregg's case*, 2 Salk. 597, 1 H. Bl. 24, S. C.; *Hopkins v. Shrole*, 1 B. & P. 382; and see ante, 591.

(c) *Banks v. Brand*, 3 M. & Sel. 525; ante, 591.

(d) *Doe d. Whitfield v. Roe*, 3 Taunt. 402.

(e) See *Doe d. Harris v. Masters*, 2 B. & C. 490, 4 D. & R. 45, S. C.; *Roe d. West v. Davis*, 7 East, 363.

(f) *Goodtitle v. Holdfast*, 2 Str. 900, or even after execution if the parties will consent, Har. L. & T. 844.

(g) See *Doe d. Harcourt v. Roe*, 4 Taunt. 883; ante, 562.

(h) Ca. Pr. C. B. 6; 2 Sellon, 127. See the forms, Chit. Forms, 457.

(i) See *Doe d. Tubb v. Roe*, 4 Taunt. 887; ante, 562.

(j) See *Doe d. Kay v. Soley*, 2 W. Bl. 726; *Bingham d. Redhead v. Oakes*, Barnes, 182; *Felton v. Ash*, Id. 177; *Goodright v. Moore*, Id. 176; *Archer v. Snatt*, 2 Stra. 1107, Andr. 341, S. C.; *Anon.* 1 Stra. 413; *Goodtitle v. Pope*, 7 T. R. 185; *Berthen v. Street*, 8 T. R. 326.

(k) *Doe d. Blagg v. Steel*, April 30, 1832, K. B. MS., 1 Dowl. P. C. 359, S. C.

by the terms of the rule or order, must have also paid him the costs of the action as far as it had proceeded; but this is now otherwise.

In ordinary cases, the proceedings may be stayed, upon application to a Judge at chambers (m); or by application to the Court in term time, in which case the rule is absolute in the first instance; in other cases you must apply for a rule to shew cause. As soon as you have obtained the rule absolute or order, get an appointment on it from the master, and serve a copy of the rule or order with the appointment on the plaintiff's attorney or agent; then get the costs taxed, and pay them without delay (n). If the rule or order be drawn up, that upon payment of debt and costs within a certain time the proceedings be stayed, and the debt and costs be not paid within the time so limited, the plaintiff should proceed in the action; the rule being conditional, he cannot thereupon obtain an attachment (o). But sometimes the order is drawn up, so as to make it absolutely binding on the defendant to pay the costs, in which case the plaintiff may proceed by attachment for the recovery of them (p). It may be observed, that an attorney, who stays proceedings on an undertaking to pay the costs, is bound to pay them, though his client die before bail is put in (q).

*In second actions for the same cause.*] Upon the application of a defendant in ejectment, the Court will stay the proceedings until the costs of a former action be paid (r); although the first action were not between the present parties, but by the father of the present lessor of plaintiff against the present defendant's father (s), and even although the present action be not for the same lands, provided it be upon the same title (t). And it is not material in this respect, whether the former action were in this or another Court (u). But if the lessor of plaintiff, upon discovering a material mistake, before trial, abandon that ejectment and bring another (x); or abandon his suit in one Court and bring a new action in another (y): the Court will not stay proceedings until the costs of the former action be paid, particularly if the proceedings do not appear to be vexatious. So, if the plaintiff were nonsuit, &c. in the first action, by the fraud or perjury of the other party, the Court will not stay the proceedings in the second action (z). Also, where a defendant in a former ejectment,

(m) See form of order, Chit. Forms. 676.

(n) See *Partington v. Williams*, 2 N. R. 398.

(o) *Fricker v. Eastman*, 11 East, 319; *Hand v. Lady Dinely*, 2 Stra. 1220; and see *Sisney v. Nevins*, Id. 699; and see 1 Camp. 559, n.; *Toms v. Powell*, 7 East, 536; *Fawcett v. Christie*, 2 B. & P. 515; *Smith v. Smith*, 2 N. R. 473; *Dodsley v. Lady Hamilton*, 5 Taunt. 1.

(p) *Fricker v. Eastman*, 11 East, 321; *Scurall v. Hurton*, Barnes, 283.

(q) *Hellings v. Jones*, 10 Moore, 360, 3 Bingham, 70, S. C.

(r) *Doe d. Pinchard v. Roe*, 4 East, 595; *Lord Coningsby's case*, 1 Str. 548;

*Grumble v. Bodilly*, Id. 554, 8 Mod. 225, S. C. See *Benn v. Denn*, Barnes, 180.

(s) *Doe d. Felton v. Roe*, 4 T. R. 645; and see *Doe d. Pinchard v. Roe*, 4 East, 595; *Doe d. Chambers v. Law*, 2 W. Bl. 1180.

(t) *Keene d. Angel v. Angel*, 6 T. R. 740.

(u) *Lord Coningsby's case*, 1 Str. 548; *Grumble v. Bodilly*, Id. 554, 8 Mod. 225, S. C.; *Doe d. Chadwick v. Law*, 2 W. Bl. 1158; *Anon.* 1 Salk. 255.

(v) *Short v. King*, 2 Str. 681, 1099; *Brittain v. Greenville*, Id. 1121.

(w) *Doe d. Selby v. Alston*, 11 T. R. 491.

(z) *Doe d. Rees v. Thomas*, 4 D. & R. 145, 2 B. & C. 622, S. C.

after being evicted, brings another ejectment for the same premises, the Court will stay the proceedings until he pay the costs of the former action (a), whether such action were in this or in another Court (b). Besides the costs of the former ejectment, the Court will in some cases also oblige the party to pay the costs of the action for mesne profits (c); but in no case will they oblige him to pay the damages in such action, however vexatious the proceedings of the present lessors of plaintiff may have been (d). Besides the cases above mentioned, the Court have stayed the proceedings in a second ejectment, until the special verdict in the former one should be determined (e). So, where the defendant, after verdict against him, brought a writ of error, and pending the writ, brought a new ejectment to recover the same premises, the Court stayed proceedings in the new action until he quitted possession, or the tenants attorned to the lessor of plaintiff in the former action (f). But the Court have refused to stay proceedings in an ejectment, until the taxed costs of a suit in equity, brought by the same party for the recovery of the same premises, were paid (g). And the Court of Common Pleas have refused to stay the proceedings in a writ of right, until the costs of a prior ejectment for the same property were paid (h).

And not only in ejectment, but also in other actions, if the second action appear to have been brought vexatiously, the Court will stay proceedings, until the costs of the former action be paid (i), provided both actions were by and against the same parties (j). Also, where an action was stayed in this Court by a consolidation rule, and the plaintiff therefore discontinued it, and commenced another action in the Common Pleas for the same cause, that Court, stayed the proceedings until after trial of the cause in this Court with which the former action had been consolidated (k). Also, in another case, where the plaintiff brought an action against the hundred in the Exchequer, and afterwards commenced another action in the King's Bench for the same cause, the latter Court ordered the proceedings in the second action to be stayed, unless plaintiff would discontinue the action in the Exchequer, the plaintiff not having declared in either action; but the Court would not grant the costs of the application (l). The Court will not stay the proceedings on the ground of the pendency of another action for the same cause against the defendant jointly with another person, except in the case of oppression or vexation; though,

(a) *Thrustout d. Williams v. Holdfast*, 6 T. R. 223.

(b) *Doe d. Walker v. Stevenson*, 3 B. & P. 22.

(c) *Doe d. Pinchard v. Roe*, 4 East, 585.

(d) *Doe d. Church v. Barclay*, 15 East, 233.

(e) *Smith d. Dormer v. Parkhurst*, 2 Str. 1105.

(f) *Fenwick v. Grosvenor*, 1 Salk. 238.

(g) *Doe d. Williams v. Winch*, 3 B. & Ald. 602; and see *Murphy v. Cadell*, 2

B. & P. 137.

(h) *Chatfield v. Souter*, 3 Bingh. 167, 10 Moore, 372, S. C.; *Boteyear v. Bowyear*, 3 M. & Scott, 65, 9 Bing. 670, S. C.

(i) *Baldwin v. Richards*, 2 T. R. 511, n.; *Melchart v. Halsby*, 2 W. Bl. 741, 3 Wils. 149, S. C.; *Crawley v. Impay*, 8 Taunt. 407. See *Winter v. Slow*, 2 Str. 878; but see *Pashley v. Poole*, 3 D. & R. 53.

(j) *English v. Cox*, Cowp. 322.

(k) *Parkin v. Scott*, 1 Taunt. 565.

(l) *Mills v. Hundred of —*, K. B. 16th June, 1832.

if such a case be made out, they will interfere in a summary way; or even, it seems, allow the party to plead in abatement, notwithstanding the *four* days have expired (*m*). The Court have refused to stay proceedings against a defendant until the debt and costs recovered by him in a former action against the present plaintiff should be paid (*n*). And, in an action for penalties, the Court will not stay the proceedings, upon an affidavit that the defendant had been sued by another person, and compounded for the same offence; at least, not unless the affidavit shew specifically what was the offence compounded, that the Court may see that both offences are the same (*o*).

The Court have also, in some few instances, under peculiar circumstances, and where the proceedings were evidently vexatious, stayed the proceedings in a second action, after a recovery for the same cause in a former one. But this is very rare; and the Court usually refuse to interfere in this summary way, but put the defendant to plead the former recovery (*p*). Where a person, however, who has a right of action against several, for one specific damage, recovers and receives a satisfaction from any one of them, the Court, for the same cause, will stay proceedings in any action he may bring against the others (*q*). And, in a late case, where separate actions were brought against several persons for the same debt, who (if at all) were *jointly* liable, the defendant in one action having paid the debt and costs in that action, the Court stayed the proceedings in the others without costs (*r*).

When the proceedings in a second action are thus stayed until payment of the costs of the former action, if such costs be not paid, the Court will not interfere, but will allow the defendant (in case those costs are not paid before a certain day) to nonpros the second action (*s*); but, if the plaintiff in such a case take any proceedings in the second action, before the costs of the first are paid, the Court, upon application, will set them aside with costs.

The application to stay the proceedings on any of these accounts should be made as soon as possible, and before the plaintiff has incurred further expenses.

*In trifling actions.*] It is deemed beneath the dignity of this Court to take cognisance of pleas under 40s.; in trespass for goods, it is expressly prohibited by stat. 6 Ed. 1, c. 8. Therefore, if it appear, either upon the face of the declaration (*t*), or by the plaintiff's acknowledgment (*u*), or even from the defendant's affidavit, if not

(*m*) *Soveter v. Dunston*, 1 M. & R. 506; *ante*, 470.

(*n*) *Cooke v. Dobree*, 1 H. Bl. 10.

(*o*) *Harrington v. Johnson*, Cowp. 744.

(*p*) *Harrington v. Johnson*, Cowp. 744; *Pechell v. Layton*, 2 T. R. 512; and see *Id.* 712.

(*q*) *Semb. Bird v. Randall*, 3 Bur.

1354, 1 W. Bl. 389, S. C.

(*r*) *Carne v. Leigh*, 6 B. & C. 124, 9 D. & R. 126, S. C.

(*s*) *Doe d. Sutton v. Ridgway*, 5 B. & Ald. 523.

(*t*) *Oulton v. Perry*, 3 Bur. 1502.

(*u*) *Kennard v. Jones*, 4 T. R. 495; and see *Melton v. Garment*, 2 New Rep. 84; *Stean v. Holmes*, 2 W. Bl. 754.

denied by the plaintiff (x), that the sum for which the action is brought is really less than 40s., the Court, or a Judge, upon application, will stay the proceedings, unless it appear that the debt is not recoverable in any county court or court of requests (y).

In an action for a debt recoverable in a court of requests, where the plaintiff might after verdict be deprived of the costs, the Court will stay the proceedings on payment of the debt without costs (z). But the Court would not, it seems, stay the proceedings in an action of *trover*, on an affidavit from the defendant that the cause of action did not amount to 40s.; the amount of the value of the article sought to be recovered by such action being mere matter of calculation to be ascertained by a jury (a).

The application should be made as soon as possible, and before the plaintiff has incurred any further expense. It might, however, it seems, be made any time before trial (b). But, if the suit be for a cause of action within the consuance of the court of requests of the district or place where the parties reside, and if there be a prohibitory clause in the statute by which the jurisdiction of the inferior court is created, (as in the Westminster and Tower Hamlets' acts), the application should be made before plea pleaded; in other cases, usually before issue joined (c). (*Vide post*, Ch. 30). The rule, if obtained in Court, is a rule *nisi*, unless perhaps where the cause of action appears from the pleadings to be under 40s. (d).

[In actions pending error, &c.] As to staying proceedings in an action upon a judgment pending error, *see Vol. 1*, 338. As to staying execution upon the original judgment, pending error, *see also Vol. 1*, 337, 338, 339. And as to staying proceedings against bail upon their recognizance, pending error in the action against the principal, *see Vol. 1*, 434, 415, 416.

\* [Staying proceedings pending rule nisi, &c.] As to this, *see post*, 782. As to staying proceedings pending an order for particulars, *see post*, 774, 775. It may as well be observed, that a motion for a rule which would operate as a stay of proceedings, cannot be made on the last day of the term, unless it appear to the Court, under the circumstances, that it could not have been made earlier (e).

[Staying proceedings where adverse claims, &c.] As to this, *see post*, Ch. 11.

(x) *Wellington v. Arters*, 5 T. R. 64. But *see Oulton v. Perry*, 3 Bur. 1592; *Anon.* 2 Ld. Raym. 1304; *Welsh v. Troyte*, 2 H. Bl. 29; *Tubb v. Woodward*, 6 T. R. 175.  
(y) *Eames v. Williams*, 1 D. & R. 359; *Welsh v. Troyte*, 2 H. Bl. 29.  
(z) *Cornforth v. Lowcock*, 1 M. & Ry. 321.

(a) *Lowe v. Lowe*, 8 Moore, 220, 1 Bingham. 270, S. C.  
(b) *See Kennard v. Jones*, 4 T. R. 495.  
(c) MS. M. 1814.  
(d) *See Kennard v. Jones*, 4 T. R. 495.  
(e) *Leader v. Harris*, Tidd's Pract. 518.

*In other cases.*] In all suits by a common informer, within stat. 1 J. 1, c. 4, (see Vol. 1, p. 2), commenced in this Court, the proceedings will be stayed upon application (f). So, if an action on a penal statute be brought in this Court, when the proper mode of proceeding is by information and conviction before a justice of peace, the Court will stay the proceedings. Actions for penalties on the lottery acts must be brought in the Court of Exchequer, in the name of the Attorney-General; (36 G. 3, c. 104, s. 38); if commenced in this Court, the proceedings will be stayed. And the same as to actions for penalties on the stamp acts. (See 44 G. 3, c. 98, s. 10; and see 7 & 8 G. 4, c. 53, ss. 57, 61; 6 G. 4, c. 109, s. 73, as to penal actions for offences against the laws of excise or customs). In an action on stat. 2 G. 2, c. 24, for bribery at an election, the Court stayed the proceedings, because the plaintiff had been guilty of a wilful delay in prosecuting the action (g); and, even after verdict, they have stayed proceedings, upon the clause of discovery (h).

In an action on a promissory note, the Court granted a rule to shew cause why the proceedings should not be stayed, upon an affidavit that the note had been obtained without consideration; and that fact not being afterwards contradicted upon shewing cause, the Court made the rule absolute (i). In general, however, the Court will not stay the proceedings in an action merely on the ground that the action will not lie (k).

Where a prisoner in execution for 200*l.* sued his plaintiff for 11*l.* and held him to bail, the Court of Common Pleas stayed the proceedings, upon the latter's acknowledging satisfaction to the extent of the 11*l.*, and 5*l.* to answer costs, on the judgment for 200*l.* which he had obtained against the former (l). So, if an action be commenced for a matter which had been set off and allowed in a former action between the same parties, the Court it seems would stay the proceedings (m). Where the plaintiff, in an action on a bill of exchange, deposited the bill as a security with another person after action brought, giving him at the same time notice of the action, the Court of Common Pleas held, that this was no ground for staying proceedings; but intimated, that if the person with whom the bill was deposited had brought a second action upon it, they would interfere to stay that action (n).

If an action be brought pending a reference, or otherwise contrary to good faith, the Court will stay the proceedings (o). Also, if an attorney bring an action, without the plaintiff's authority, the Court

(f) See *Smith v. Potter*, 1 Str. 415; *White v. Boot*, 2 T. R. 274; *Leigh v. Kent*, 3 T. R. 363.

(g) *Petrie v. White*, 3 T. R. 5.

(h) *Sutton v. Bishop*, 4 Bur. 2287.

(i) *Tidd*, 530.

(k) See *Sherwood v. Benson*, 4 Taunt. 631; *Tidd*, 530.

(l) *Peacock v. Jeffery*, 1 Taunt. 426; and see Vol. 1, 437.

(m) See *Laing v. Chatham*, 1 Camp. 252, and Vol. 1, 308.

(n) *Marsh v. Newell*, 1 Taunt. 109; and see *Columbia v. Slim*, 2 Chit. Rep. 637.

(o) *Tidd*, 9th ed. 529; *Lowes v. Ker-mode*, 8 Taunt. 146, 2 Moore, 30, S. C.; *Dicus v. Jay*, 6 Bingh. 519, 2 M. & P. 448, S. C.

will sometimes set aside the proceedings (*p*). But where an attorney brought an action for a wife, in her husband's name, (the wife living apart from her husband), without authority from the latter, the Court refused to stay the proceedings, although the husband joined the defendants in the application (*q*). And in other cases, as, where a *cestui que trust* brings an action in the name of his trustee; or in the case of joint-tenants or joint-contractors, where one is obliged to use the other's name in a suit: the Court will not stay proceedings upon the application even of the trustee, &c., excepting perhaps temporarily, until such trustee, &c., be indemnified against the costs of a nonsuit, or verdict against him (*r*).

In an action for money won at play, the Court refused to stay the proceedings until after the trial of an indictment against the parties for a cheat (*s*). So, after verdict and judgment, the Court refused to stay proceedings, until after the trial of an indictment for perjury then pending against the plaintiff's witnesses (*t*). But, where the plaintiff, who was indicted for felony, brought an action to recover money he had deposited with a banker, and which was surmised to be the produce of the felony, the Court of Common Pleas stayed the proceedings in the action until after the trial of the indictment (*u*).

The Court have stayed the proceedings after judgment recovered and affirmed on a writ of error, on the defendant's bringing the sum into court, the plaintiff having been outlawed in another action (*x*). But the Court have refused to stay proceedings upon the ground that the plaintiffs, after verdict, had become alien enemies (*y*).

Under the 6 G. 4, c. 16, s. 120, which authorizes the discharge of a certificated bankrupt taken in execution for a debt provable under his commission, the Court has incidentally a power of staying before judgment proceedings against such a bankrupt for such a debt (*z*).

(*p*) See *Robson v. Eaton*, 1 T. R. 62; *Buckle v. Roach*, 1 Chit. Rep. 194. But see Vol. 1, 38.

(*q*) *Chambers v. Donaldson*, 9 East, 471; and see — *v. Smith*, 2 Chit. Rep. 392.

(*r*) See *Spicer v. Todd*, 1 Dowl. P. C. 306, 2 C. & J. 163, S. C.; *ante*, 544. In case of dispute, the sufficiency of the indemnity would be referred to the Master.

(*s*) *Anon.* 2 Salk. 649.

(*t*) *Warwick v. Bruce*, 4 M. & Sel. 140; see also *Lofft*, 436; *Rex v. Tremearne*, 5 B. & C. 761, 8 D. & R. 590, S. C.

(*u*) *Deakin v. Praed*, 4 Taunt. 825.

(*x*) *Grant v. Bryant*, 6 M. & S. 347.

(*y*) *Vaubrynen v. Wilson*, 9 East, 321.

(*z*) *Sadler v. Cleaver*, 5 M. & P. 706, 7 Bingh. 769. S. C.



## CHAPTER XI.

## RELIEF AGAINST ADVERSE CLAIMS MADE ON SHERIFFS, AND OTHER PERSONS.

THE following important provisions have been recently enacted by 1 & 2 W. 4, c. 58, for the purpose of enabling Courts of law to give relief against adverse claims made on sheriffs and other officers, and persons having no interest in the subject of such claims.

*Relief for persons in general.*] The first section of the act, after reciting that "it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a *suit in equity* against the plaintiff and such third party, usually called a *bill of interpleader*, which is attended with expense and delay;" for remedy thereof enacts, "that, upon application made by or on behalf of any defendant sued in any of his Majesty's Courts of law at Westminster, or in the Courts of Common Pleas of the county palatine of *Lancaster*, or in the Court of Pleas of the county palatine of *Durham*, in any action of *assumpsit*, *debt*, *detinue*, or *trover*, such application being made after declaration, and before plea, by affidavit (a) or otherwise, shewing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject matter of the action, in such manner as the Court or any Judge thereof may order or direct, it shall be lawful for the Court, or any Judge thereof, to make rules (b) and orders, calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order, to hear the allegations as well of such third party as of the plaintiff, and in the mean time to stay the proceedings in such action, and finally to order (c), such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues (c), and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attornies, to dispose of the merits of their claims, and determine the same in a summary manner, and to make such other rules and orders

(a) See form, Chit. Forms, 678.

(b) See form, Chit. Forms, 679.

(c) See a form, Chit. Forms, 679, 680.

(d) As to the proceedings on a feigned issue, see *ante*, Vol. 1, 463.

therein as to *costs* and *all other matters* as may appear to be just and reasonable." (1 & 2 W. 4, c. 58, s. 1). This act does not take away the party's remedy by bill of interpleader in equity; but, if he has proceeded in equity, it seems the common law courts will not afterwards interfere (e). A defendant who is sued for the recovery of property in his possession, in which he has no interest, but which is claimed by a third person, cannot apply to be relieved under this act against the claims of the plaintiff and of such third party, if he has taken an indemnity from the claimant; for he has thereby identified himself with the claimant (f). So, if a defendant officiously interposes in the affairs of another, and so has placed himself in a difficulty between adverse claims, the Court will in its discretion generally refuse to relieve him (g). Where a wharfinger, against whom an action of trover was brought, and who retained possession of the goods, the subject of the action under a claim of *lien*, applied to the Court, that a third party, who claimed in opposition to the plaintiff, should be made defendant in his stead, and pay off his lien; but the Court thought the case not within this act (h). Until judgment is signed, money which has been paid into court on a feigned issue under this act, will not be allowed to be taken out by the successful party (i).

By sect. 2, "the judgment in any such action or issue as may be directed by the Court or Judge, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them." Until the judgment in the action or issue is obtained, neither of the parties is in general secure against the future claims by the other for the same matter (j).

By sect. 3, "if such *third party* shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith (k), or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or Judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators (saving nevertheless the right or claim of such *third party* against the plaintiff), and thereupon to make such order between such defendant and the plaintiff, as to *costs* and other matters, as may appear just and reasonable."

By sect. 4, "no order shall be made in pursuance of this act by a single Judge of the Court of Pleas of the said county palatine of Durham, who shall not also be a Judge of one of the said courts at Westminster; and that every order to be made in pursuance of this

(e) See *Sturgess v. Claude*, 1 Dowl. P. C. 503.

(f) *Tucker v. Morris*, 1 Dowl. P. C. 639, 1 C. & M. 73, S. C.

(g) *Belcher v. Smith*, 9 Bing. 82.

(h) *Bruduck v. Smith*, 9 Bing. 84.

VOL. II.

(i) *Cooper v. Lead Smelting Company*, 1 Dowl. P. C. 723.

(j) See *Cooper v. Lead Smelting Company*, 1 Dowl. P. C. 723.

(k) See form of affidavit, Chit. Forms, 679.

act by a *single Judge*, not sitting in open court, shall be liable to be *rescinded or altered by the Court*, in like manner as other orders made by a *single Judge*.”

By sect. 5, “if upon application to a *Judge* in the first instance, or, in any later stage of the proceedings, he shall think the matter more fit for the decision of the *Court*, it shall be lawful for him to refer the matter to the *Court*; and thereupon the *Court* shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of *Court*, instead of the order of a *Judge*.”

By sect. 7, “all rules, orders, matters, and decisions to be made and done in pursuance of this act, (except only the affidavits to be filed), may, together with the declaration in the cause (if any), be *entered of record*, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so *entered* shall have the *force and effect of a judgment*, (except only as to becoming a charge on any lands, tenements, or hereditaments); and in case any *costs* shall not be paid within fifteen days after notice of the taxation, and amount thereof given to the party ordered to pay the same, his agent or attorney, *execution may issue for the same by fieri facias or capias ad satisfaciendum*, adapted to the case, together with the costs of such entry, and of the execution if by *feri facias*; and such writ and writs may bear *teste on the day of issuing the same*, whether in term or vacation (*k*); and the *sheriff or other officer executing any such writ* shall be entitled to the same *fees*, and no more, as upon any similar writ grounded upon a judgment of the *Court*.”

The practice as to making the entry in pursuance of the above enactment, taxing costs, and sitting out execution, as pointed out by Mr. Chapman in his second Addenda to his Practice, (p. 162), is as follows:—*The entry must be upon a judgment roll, commencing with the declaration in the cause (if any); then follows the rule, order, or decision of the Court or Judge on the application. Make out a docket paper (l). Take the roll to the clerk of the judgments, who will number the roll. The clerk will make the proper entry, and the roll must then be carried in to the treasury in the same manner as judgment rolls are. When costs are given by any rule or order, the party entitled to such costs must obtain from the Master an appointment on the rule to tax such costs; a copy of the rule and appointment must be served the day prior to the taxation of costs on the opposite attorney. After taxation of the costs, notice in writing (m) must be given of the amount of costs allowed to the party ordered to pay the same, or to his attorney or agent; and if the costs are not paid within fifteen days after such notice, a fieri facias or capias ad satisfaciendum (n) may be issued for the*

(k) See also the 3 & 4 W. 4, c. 67, s. 2.

(l) See form, Chit. Forms, 682.

(m) See the form, Chit. Forms, 682.

(n) See the forms, Chit. Forms, 682, 683.

same, and the party may, in addition to the costs allowed, levy for the costs of the *fi. facias*, but not for the costs of the *ca. sa.* The fifteen days' notice must be given, whether the party, his attorney, or agent, attend the taxation of costs or not. The most effectual way of giving notice of the amount of costs allowed on taxation will be, by service of a copy of the rule of Court, with the Master's allocatur for costs thereon on the party required to pay the same, his attorney or agent, with an indorsement stating, that unless the amount allowed for costs be paid within fifteen days, execution will be issued for the recovery thereof. The notice does not require personal service (o).

*Relief for sheriffs and officers executing process against goods, &c.]* Before the passing of the 1 & 2 W. 4, c. 58, if the property in goods taken under an execution were in dispute, as frequently happens in the case of bankruptcy, &c. the Court, upon the suggestion of this or any other reasonable cause, by the sheriff, would enlarge the time for making the return, until the right were tried, or until one of the parties had given the sheriff a sufficient indemnity (p). This, however, was not to be considered a general rule; but the indulgence was granted only in special cases, under particular circumstances; because the sheriff, where the property is in dispute, may summon an inquest to say whose property it is, before he returns the writ. (*Vide post*). But, in all cases where the doubt arose from a point of law, and not from mere matter of fact, the Court, upon application, would enlarge the time for making the return (q); therefore, where the doubt was, whether goods seized under a *fi. fa.* were not covered by an extent afterwards sued out, the Court enlarged the time for making the return to the *fi. fa.*, for the purpose of inducing the plaintiff to go into the Court of Exchequer, and there contest the question of right with the Crown (r).

Now, however, a much more effectual relief is afforded to sheriffs and other officers in such cases by the above act, section 6 of which, after reciting that "difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers," enacts, "that when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof,

(o) Chapman's Second Addenda to his Practice, 162 to 166.

(p) *Semb. Wells v. Pickman*, 7 T. R. 174; *Shaw v. Tunbridge*, 2 W. Bl. 1064, 1181; and see *King v. Bridges*, 7 Taunt. 204, 1 Bingham, 71, S. C.; *Bernasconi v. Farebrother*, 7 B. & C. 379; *Bea-*

*van v. Dawson*, 4 M. & P. 387, 6 Bingham, 566, S. C.; Tidd, 9th ed. 1017.

(q) See *George v. Birch*, 4 Taunt. 585.

(r) *Wells v. Pickman*, 7 T. R. 174; *Thurston v. Thurston*, 1 Taunt. 120.

it shall and may be lawful to and for the Court from which such process issued, upon application(s) of such sheriff or other officer made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of Court (t), as well the party issuing such process as the party making such claim, and thereupon to exercise for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules (u) and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the Court." The sheriff or officer, if he thinks fit, notwithstanding this act, may, as heretofore, apply to the Court to enlarge the time for making his return: and in some cases not within the act, such application would be expedient. The application under the act must be made to the Court, a Judge at chambers has no jurisdiction (w). If process is issued out of different Courts and directed to the same sheriff, the application must be made to the respective Courts out of which the process issued (x). It should be made by the sheriff, in a reasonable time after receiving notice of the adverse claim (y). The sheriff should, it seems, deny collusion with any of the parties (z). The Court will not interfere under this act for the sheriff, unless a claim to the property has been made; and the claim must, it seems, be of such a nature as may be followed by an action (a). A person in actual possession of the goods seized under a *fi. fa.* against the defendant, is still a claimant within the act (b). Although the act, from its language, may seem to have in view only those cases in which the absolute property is claimed, yet the letter of the act will comprehend cases of lien (c). The Court will not relieve the sheriff, under the act, where he has paid over the proceeds of the execution to the judgment creditor (d). Nor will they relieve him where he has seized under one *fi. fa.*, and the question is, whether that writ ought to have precedence of another (e). Where goods had been taken by the sheriff under a *fi. fa.* and sold by him, another *fi. fa.* having issued in the mean time against the same goods, and where a party claimed title to the property against both the plaintiffs, the defendant and the sheriff, and complained that the goods had been sold improvidently and in spite of notice from the owner, the Court made a special order for relief of the sheriff, under the above act (f).

(s) See form of affidavit, Chit. Forms, 680.

(t) See form of a rule, Chit. Forms, 681; *Parker v. Booth*, 1 M. & Scott, 156, 8 Bingh. 85, S. C.

(u) See form, Chit. Forms, 681.

(v) *Shaw v. Roberts*, T. T. 1832, 6 Leg. Obs. 445.

(x) *Bragg v. Hopkins*, April 19, 1833, K. B. MS., and 6 Leg. Obs. 15, S. C.

(y) *Devereux v. John*, 1 Dowl. P. C. 548; *Cooke v. Robert*, 6 Leg. Obs. 221.

(z) *Cooke v. Robert*, 6 Leg. Obs. 221.

(a) *Isaac v. Spilsbury*, 10 Bingh. 3.

(b) *Parker v. Dynes*, 1 Dowl. P. C. 163.

(c) *Ford v. Baynton*, E. T. 28th April, 1802, K. B., 1 Dowl. P. C. 357, S. C.

(d) *Anderson v. Calloway*, 1 C. & M. 182, 1 Dowl. P. C. 636, S. C.

(e) *Day v. Waldo*, 1 Dowl. P. C. 523. See *Salmon v. James*, Id. 369.

(f) *Howman v. Buck*, 3 B. & Adol. 103.

Where no blame appears to attach either to the execution creditor, the claimant, or the sheriff, each party will have to pay his own costs attending the application (*g*). Where an adverse claim is set up to goods seized by the sheriff, under an execution, and the latter applies for relief under this act, and the adverse claimant does not appear to support his claim, the Court will bar his claim as to the sheriff, and make him pay the judgment creditor his costs of appearing on the sheriff's rule (*h*); and so, on the other hand, if in such a case the adverse claimant does appear on the sheriff's rule, and the judgment creditor does not, then the Court will order the latter to pay the adverse claimant's costs (*i*). If the Court discharges the sheriff's rule, they frequently order him to pay the costs (*j*). The Court may adjudicate as to the costs of appearing to the sheriff's rule, and of an issue directed to be tried under it, although the trial of it has taken place (*k*).

The Court will not, in general, allow the sheriff his costs (*l*), the act being passed for his relief, and his claim to poundage depends on the legality of the seizure, consequently the Court will, in general, order him to pay the proceeds of the goods seized into court, without allowing him to deduct such poundage (*m*). But where the adverse claimant or execution creditor, after a rule absolute is made on the first application, appears and opens the rule, the Court will grant the sheriff his costs of his second appearance (*n*).

*The practical directions, (ante, 758), as to the mode of entering the proceedings on record, and taxing costs, and suing out execution on a rule obtained under the above enactment, on behalf of the sheriff, &c. will be here applicable.*

(*g*) *Morland v. Chitty*, 1 Dowl. P. C. 520.

(*h*) *Bowdler v. Smith*, 1 Dowl. P. C. 417.

(*i*) *Bryant v. Ikey*, 1 Dowl. P. C. 428.

(*j*) *Anderson v. Calloway*, 1 C. & M. 182, 1 Dowl. P. C. 636, S. C.; *Cooke v. Roberts*, 6 Leg. Obs. 221.

(*k*) *Seaward v. Williams*, 1 Dowl. P.

C. 528.

(*l*) *Bowdler v. Smith*, 1 Dowl. P. C. 417; *Barker v. Dynes*, Id. 169; *Bryant v. Ikey*, Id. 428; *Field v. Cope*, Id. 567, 2 C. & J. 567, 2 C. & M. 480, S. C.; and see 1 M'Clel. & Y. 198.

(*m*) Id.

(*n*) *Bryant v. Ikey*, 1 Dowl. P. C. 428.

## CHAPTER XII.

## SECURITY FOR COSTS.

*In what cases.*] If the plaintiff reside abroad (a), or even in Ireland (b), or Scotland (c), the Court, upon application, will stay the proceedings, until he give security for costs, and this although he sue as executor (d); and in a recent case the Court of Common Pleas stayed the proceedings in replevin, until the defendant (who resided out of the jurisdiction of the Court) found security for costs (e). So, where a plaintiff in error resides out of the jurisdiction of the Court, he may be in like manner compelled to find security for costs; and, in default thereof, the defendant in error will be allowed to proceed on his judgment, notwithstanding the writ of error (f). And it will be no answer to this application, to say, that the plaintiff is in England, and was so when the action was commenced, unless the affidavit go on to state expressly that the plaintiff resides, and intends to continue to reside, in England (g). Where there are several plaintiffs, however, if any one of them reside in this country, the Court will not stay the proceedings (h). The practice of this Court and of the Common Pleas differs, in some respects, upon this subject (i); and even the present practice of this Court, as above stated, is different from what it was formerly (k). The Court of Exchequer have recently refused to make an order to stay proceedings, until security be given for costs, upon the ground of the plaintiff being about to leave the country (l).

The Court, however, will not compel a foreign ambassador, or his servant, to give security for costs (m); although ambassadors and their suites, by a fiction of the *jus gentium*, are considered as still resident

(a) *Pray v. Edie*, 1 T. R. 267.

(b) *Fitzgerald v. Whitmore*, 1 T. R. 362; *Limerick and Waterford Railway Company v. Frazer*, 1 M. & P. 23, 4 Bingh. 394, S. C.

(c) *Baxter v. Morgan*, 6 Taunt. 379; and see *Id.* 20; *Naylor v. Joseph*, 10 Moore, 522.

(d) *Chevalier v. Finnis*, 1 B. & B. 277, 3 Moore, 602, S. C.

(e) *Selby v. Cruchley*, 1 B. & B. 505, 4 Moore, 280, S. C.

(f) *Lewis v. Owens*, 5 B. & Ald. 265.

(g) *Oliva v. Johnson*, 5 B. & Ald. 908, 1 D. & R. 560, S. C.; *Naylor v. Joseph*, 10 Moore, 622; *Anon.* 2 Chit. Rep. 152.

(h) *McConnell v. Johnston*, 1 East, 431; *Anon.* 7 Taunt. 307; *Anon.* 2 C. & J. 88, 1 Dowl. P. C. 300, S. C.

(i) *Parrot v. Ealing*, 1 H. Bl. 106; *Porrier v. Carter*, *Id.*; *Ganesford v. Levy*, 2 Id. 118; *Henschen v. Garves*, *Id.* 383; *Jacobs v. Stevenson*, 1 B. & P. 96; *Maria v. Hall*, 2 Id. 236; *Tullock v. Crowley*, 1 Taunt. 18; *Ball v. Adrian*, *Id.* 64; *Nelson v. Ogle*, 2 Id. 253; *Anon.* 7 Id. 386; *Durell v. Mathyson*, 8 Id. 711; *O'Leary v. Macdonald*, *Id.* 736; *Anon.* *Id.* 737.

(k) See *Real v. Macky*, 2 Str. 1206; *Lamii v. Sewell*, 1 Wils. 266; *Rosewell v. Irish*, 4 Bur. 2105; *Maxwell v. Mayer*, 2 Id. 1026; *Nuncomar v. Burdett*, Cowp. 158.

(l) *Willis v. Garbutt*, 1 Y. & J. 511.  
(m) *Duke de Montella o v. Christin*, 5 M. & Sel. 503.

in the state from which they have been sent, and are not amenable to process in the country in which they actually reside.

In ejectment, if the lessor of the plaintiff be an infant, the Court, upon application, will stay the proceedings, until security be given for costs (*n*), or his guardian undertake for the payment of them (*o*), or some real and responsible person be named as plaintiff (*p*). So, if the lessor of the plaintiff reside abroad (*q*), or die pending the action (*r*), the Court will stay the proceedings in like manner, until such security be given. But where a similar application was made, upon the ground of the lessor of the plaintiff having privilege of parliament, it was refused (*s*). The defendant may also, if necessary, either by motion or summons, compel the plaintiff's attorney to disclose the place of residence of the lessor of the plaintiff: or if the attorney refuse to do so, the proceedings will be stayed until security be given for costs (*t*). No application, however, for this purpose will be entertained after verdict. (*Vol.* 1, 29, 30). Also, if the nominal plaintiff in the ejectment be made plaintiff in the action for mesne profits, the Court will stay the proceedings in this latter action, until security be given for costs (*u*).

The Court, however, will not require security for costs, merely because the plaintiff is insolvent, even in a *qui tam* action (*x*), or where he has assigned the debt (*y*), unless where he has actually taken the benefit of the insolvent act after action brought (*z*); nor will the Court oblige an infant to find security for costs, where his *prochein amy* is sworn to be insolvent (*a*); nor will they require an uncertificated bankrupt to give such security (*b*), unless the action be brought for the benefit of the assignees (*c*). But if a plaintiff be convicted of felony, and under sentence of transportation, the Court will stay the proceedings until he give security for costs (*d*).

Where the defendant has possessed himself of all the plaintiff's property, so as to divest him of all power to give security for costs, the Court will not require it (*e*).

Where a *cestui que trust* brings an action in the name of his trustee, or where one joint tenant or joint contractor uses the other's name

(*n*) *Anon.* 1 Wils. 130; *Thrumorton d. Miller v. Smith*, 2 Str. 932.

(*o*) *Anon.* Cowp. 128.

(*p*) *Noke v. Windham*, 2 Str. 694. See a form, Chit. Forms, 458.

(*q*) *Denn d. Lucas v. Fulford*, 2 Bur. 1177.

(*r*) *Thrustout d. Turner v. Gray*, 2 Str. 1056.

(*s*) *Preston v. Lingen*, 1 Str. 479, 8 Mod. 20, S. C.

(*t*) *Short v. King*, 1 Str. 681; Vol. 1, 29, 30.

(*u*) *Pike v. Corbin*, Say. 78.

(*x*) *Golding v. Barlow*, Cowp. 24; *Field v. Carron*, 2 H. Bl. 27; *Gregory v. Elgin*, MS., 2 Nov. 1833, Exch., in which case the plaintiff had brought

nearly 100 actions against publicans for penalties under the 25 Geo. 2, c. 16.

(*y*) *Morgan v. Evans*, 7 Moore, 344; *Day v. Smith*, 1 Dowl. P. C. 460.

(*z*) *Heaford v. M'Knight*, 4 D. & R. 81, 2 B. & C. 579, S. C.

(*a*) *Yarworth v. Mitchell*, 2 D. & R. 423; and see 2 Chit. Rep. 259.

(*b*) *M'Connell v. Johnston*, 1 East, 431; *Minchin v. Hart*, 1 Chit. Rep. 215;

*M'Cullock v. Robinson*, 2 New Rep. 352; *Anon.* 2 Taunt. 61; *Snow v. Townsend*, 6 Id. 123.

(*c*) *Webb v. Ward*, 7 T. R. 296.

(*d*) *Harvey v. Jacob*, 1 B. & Ald. 159.

(*e*) *M'Cullock v. Robinson*, 2 New Rep. 352; and see *Roper v. Phillips*, 3 M. & Ry. 84.



in bringing a joint action, the Court would probably, upon application of the trustee, or other joint tenant or joint contractor, stay the proceedings in the action, until the party bringing it should indemnify such trustee, &c. as to costs, in case of a nonsuit or verdict against him. (*See ante*, 755).

*How obtained.*] The defendant should first apply to the plaintiff's attorney for security for costs (*f*); and if it be refused, he may give notice of the motion (*g*), and move the Court accordingly. If it be not intended, however, that the rule should be a stay of proceedings, but merely a rule upon the plaintiff requiring him to give security for costs, a previous application to the plaintiff's attorney will be unnecessary (*h*), as also the notice of motion.

It will, in ordinary cases, be too late after issue joined to make this motion, if the defendant had an opportunity of making an earlier application. (*R. H. 2 W. 4, r. 98 (i)*). Indeed, the general rule is, that the defendant must make his application promptly, after he knows of the plaintiff's being abroad (*k*), and before he takes any subsequent step in the cause; and therefore you cannot move after plea pleaded, unless you state in your affidavit that you were not apprised of the plaintiff's being abroad at the time you pleaded (*l*). You may, however, move, though you have obtained an order for time to plead (*m*). You cannot so move until after bail have been put in (*n*), and justified (*o*), unless the defendant be in custody; in which case, if the plaintiff do not give security for costs within a reasonable time after being ruled to do so, the Court, upon application, will discharge the defendant upon entering a common appearance (*p*). If there be two or more defendants, and one of them put in bail, he may require the plaintiff to give security for costs, without putting in bail for the others (*q*). According to a late decision, the affidavit in support of the application need not, it seems, state in what stage the proceedings are; if the application be too late, it is for the plaintiff to shew it in the affidavit, in shewing cause (*r*); but this seems questionable.

(*f*) *Bass v. Clive*, 3 M. & Sel. 283. See form, Chit. Forms, 684.

(*g*) See the form, Chit. Forms, 684.

(*h*) *Baille v. De Bernales*, 1 B. & Ald. 331; *Hancock v. Smith*, 2 Chit. Rep. 150; *Jones v. Jones*, 10 Law Jour. 7, 1 Dowl. P. C. 313, S. C. See *Slap v. Clive*, 3 M. & Sel. 283, cont.

(*i*) See *Walters v. Frythall*, 5 East, 338; *Adams v. Brown*, 1 Dowl. P. C. 273, 2 C. & J. 207, S. C.

(*k*) *Anon.* 2 Chit. Rep. 151.

(*l*) *Duncan v. Stint*, 5 B. & Ald. 702,

1 D. & R. 348, S. C.; *Brown v. Wright*, 1 Dowl. P. C. 95.

(*m*) *Wilson v. Minchin*, 2 C. & J. 87, 2 Tyr. 166, 1 Dowl. P. C. 299, S. C.

(*n*) *De la Preuve v. Duc de Biron*, 4 T. R. 697; *Anon.* 2 Chit. Rep. 152.

(*o*) MS. M. 1814.

(*p*) MS. T. 1820.

(*q*) *Gray v. Shaw*, 6 T. R. 496. See form of affidavit, Chit. Forms, 684; and of rule nisi thereon, Id. 685.

(*r*) *Jones v. Jones*, 10 Law Jour. 77.

## CHAP. XIII.

## OYER OF DEEDS, &amp;c.

*In what cases.*] IN all cases where a deed, &c. is pleaded with a profert, either by the plaintiff or defendant, the other party may have oyer of it (provided the profert have been necessary) (a), and may then set it forth in his plea, if he will. Unless there have been a profert, however, oyer cannot be prayed, and therefore if a deed be pleaded without profert, the other party should demur specially for the want of it, particularly if it be essential to his plea, &c. that the deed should be set forth. In debt on bond conditioned to perform covenants in an indenture, the defendant cannot crave oyer of the indenture, the bond alone in such a case being pleaded with a profert; but he must himself set forth the indenture with a profert, if it be necessary to his plea, and the plaintiff may have oyer of it (b).

Oyer is generally craved, where it is essentially necessary that the deed, &c. pleaded, should be set forth, before the party craving oyer can plead. So, if any part of a deed be omitted in a declaration, &c. which ought to be stated, or if the deed be erroneously stated, the other party should set forth the deed upon oyer and demur (c). It is usually craved of bonds and other specialties; sometimes of letters of administration (d); and it has been allowed of policies of insurance (e). It cannot, however, be craved of a deed operating under the statute of uses (f); nor of private acts of parliament (g); nor of letters patent, or other records (h). If a record of the same court, however, be pleaded, we have seen (*ante*, 482) that the opposite party may demand a note in writing of the term and number of the roll on which such matter of record is entered or filed. It cannot be craved of mesne process (i), nor can it be craved of an original writ (j).

It may be observed that the term "oyer" does not import inspection of the deed; consequently, in cases where the party is desirous of such inspection, he must take out a summons, or apply to the Court for that purpose, as mentioned *post*, 779, 771. In one case in debt on bond with a profert, the Court refused to make a rule on

(a) *Morris's case*, 2 Salk. 497.

(b) 1 Saund. 8; *Cook v. Remington*, 2 Salk. 498, 6 Mod. 237, S. C.; 2 Saund. 405, (n. 1), 409, (n. 2).

(c) Hutt. 33; *Stibbs v. Clough*, 1 Str. 227; 1 Saund. 317, (n. 2); 2 Id. 366 a.

(d) *Garrard v. Early*, 2 Wils. 413.

(e) *Buisier v. London Assurance*

*Company*, Hardw. 243.

(f) *Denman v. Bull*, 9 Moore, 593, 3 Bingh. 499, S. C.

(g) *Jeffery v. White*, 2 Doug. 477.

(h) *Rex v. Amery*, 1 T. R. 149.

(i) *Anon. Tidd*, 126.

(j) *R. T. 19 G. 3; Roote v. Edwards*, 1 Doug. 227.

the plaintiff to allow an inspection of it, because defendant suspected it to be forged (*k*); but they granted it in another (*l*).

The party craving oyer is not bound to plead without it, in cases where it is properly demandable (*m*), and this though the deed be lost (*n*). If it be craved where it is not demandable, the other party may treat the demand of oyer as a nullity, and sign judgment; but if, instead of doing so, he grant the oyer, the party who craved it may consider and treat the whole instrument as part of the other's plea (*o*).

*When, by whom, and how demandable:]* Oyer cannot be demanded after the term in which the deed, &c. is pleaded (*p*), and consequently not after an imparlance to another term (*q*); nor can it be demanded after a plea in abatement (*r*). It must be demanded, however, before the time for pleading, or the time limited by a Judge's order for pleading, has expired (*s*); or, if made afterwards, it may be treated as a nullity, and the other party may sign judgment (*t*). Under circumstances, however, the Court have granted oyer, though sought for after the term in which the deed, &c. is pleaded; and on an amendment it is frequently ordered that the defendant have oyer of the deed or probate, &c. though long after the term in which the deed or probate, &c. was pleaded.

Oyer, though it seems upon the pleadings and is supposed to be granted by the Court, is in fact demanded and granted by the attornies (*u*). The demand is made by a note in writing (*v*).

If the deed, &c. be in the hands of a third person, the Court upon application will oblige him to give oyer of it, and produce it if necessary (*x*).

*When and how granted, and time for pleading after.]* The plaintiff is not bound to grant oyer within any limited time after it has been demanded (*y*). But it is generally his interest to grant it without delay; for the defendant, we have seen, (*Vol.* 1, 195), is entitled to as many pleading days after the oyer has been given, as he had yet unexpired at the time of demanding it. But if the plaintiff de-

(*k*) *Chetwind v. Marnell*, 1 B. & P. 271; and see post, 770.

(*l*) *Anon.* cited 8 Moore, 588.

(*m*) *Soresby v. Sparrow*, 2 Str. 1186, 1 Wils. 16, S. C.

(*n*) *Id.*

(*o*) *Jeffery v. White*, 2 Doug. 476; *Longvill v. Hundred of Thistleworth*, 6 Mod. 27; *Cook v. Remington*, Id. 237; 1 Saund. 317, (n. 2). See 3 T. R. 153, n.

(*p*) *Roberts v. Arthur*, 2 Salk. 497; 5 Com. Dig. 142, 133; 5 Co. 74 b; *Mayor of London v. Correy*, 2 Lev. 142; *Rex v. Amery*, 1 T. R. 149.

(*q*) Doct. Pl. 272; 22 H. 6, c. 30; *Longvill v. Hundred of Thistleworth*, 6 Mod. 20; 2 Salk. 498, S. C.

(*r*) *Longvill v. Hundred of Thistle-*

*worth*, 6 Mod. 28, 2 Salk. 498, S. C.

(*s*) *Rex v. Amery*, 1 T. R. 150; *Gerrard v. Early*, 2 Wils. 413; *Luke of Leeds v. Fevers*, Barnes, 268; *Farrance v. Brignall*, Id. 241; *Barber v. Satchwell*, Id. 326; *Hartley v. Varley*, Id. 329; *Tidd*, 586; *Sellon*, 288.

(*t*) *Barber v. Satchwell*, Barnes, 326; and see *Sparkes v. Simpson*, 2 B. & P. 379.

(*u*) 12 Mod. 598; *Anon.* 3 Salk. 119; *Longvill v. The Hundred of Thistleworth*, 6 Mod. 28, 2 Salk. 498, S. C.

(*v*) See form of demand, Chit. Forms, 686.

(*x*) *White v. Earl of Montgomery*, 2 Str. 1198; 1 Sellon, 262.

(*y*) *Webber v. Austin*, 8 T. R. 356.

mand oyer (*z*), the defendant must grant it within two days exclusive of that on which it is demanded, Sunday not being reckoned if it be the last of the two (*a*), otherwise the plaintiff may sign judgment as for want of a plea (*b*). The plaintiff has the same time to reply after oyer has been given, as he had at the time of the demand. (*R. T. 5 & 6 G. 2.*)

As soon as oyer is craved, make out a copy of the deed, including the names of the witnesses by whom it was attested (*c*), and deliver it to the opposite attorney (*d*), who must pay for it at the rate of 4*d.* per sheet. (*R. T. 5 & 6 G. 2.*)

*Refusal of oyer.*] To refuse oyer when it ought to be granted is error (*e*). In order to bring error, the party insisting upon oyer must enter his prayer upon record; and this being in the nature of a plea, the other party may either counterplead or demur to it, and the Court will thereupon give judgment (*f*); upon which judgment, the writ of error may be brought. Error, however, does not lie for granting oyer where it is not demandable (*g*).

*Proceedings after oyer.*] After oyer is granted, it is optional with the party whether he set it forth in his plea or not (*h*). If, however, he undertake to set it forth, and do not set forth the whole deed, or if he misrecite it, the plaintiff may either sign judgment as for want of a plea (*i*), or he may pray that the deed be enrolled, and thereupon have it truly enrolled, and demur (*k*). But this must be understood as extending to cases only where the whole of the deed relates to the matter of action; for if it contain other matters besides those which are to be performed by the party craving oyer, it seems to be unnecessary to set out the irrelevant matter, but it is sufficient for him to set out *verbatim* the whole of the matters which relate to him (*l*); otherwise in some cases the record might run to an immoderate length (*m*).

If the declaration do not set out the deed accurately, and the defendant intend taking advantage of it on account of a variance, he should plead *non est factum* without setting out the deed on oyer, or the variance would not be available on such a plea after setting out

(*c*) See form of demand, Chit. Forms, 686.

(*a*) *Page v. Divine*, 2 T. R. 40.

(*b*) *Anon.* 6 Mod. 122.

(*c*) *Longmore v. Rogers, Willes*, 288; and see *Lady Cook v. Remington*, 6 Mod. 237.

(*d*) *Page v. Divine*, 2 T. R. 40.

(*e*) 6 Mod. 122; *Soresby v. Sparrow*, 2 Str. 1186, 1 Wils. 16, S. C.

(*f*) *Mayor of London v. Gorrey*, 2 Lev. 142; *Longvill v. Hundred of Isleworth*, 2 Salk. 498, 2 Ld. Raym. 969, S. C.

(*g*) 1 Saund. 9*b*; 2 Id. 46*b*.

(*h*) *Weavers' Company v. Forrest*, 2 Str. 1241.

(*i*) *Wallace v. Duchess of Cumberland*, 4 T. R. 370; *Cole v. Hulme*, 3 M. & Ry. 86, *n.*; *ante*, Vol. 1, 204.

(*k*) Com. Dig. Pleader, P. 1; and see *Wallace v. Duchess of Cumberland*, 4 T. R. 370, *n.*

(*l*) *Wallace v. Duchess of Cumberland*, 4 T. R. 370; 1 Saund. 317, (*n.* 2).

(*m*) 1 Saund. 317, (*n.* 2); and see 1 Saund. 9, 52; *Lady Cook v. Remington*, 6 Mod. 237.

the deed (n). But if the deed as set out do not support the breach assigned, then the mode of taking advantage of the defect is by craving oyer of and setting out the deed, and demurring (o).

If the defendant, craving oyer of a deed, do not afterwards set it forth in his plea, the plaintiff may (if he think fit) insert it for him in the issue or demurrer book, the costs of such insertion, however, being in the discretion of the Master. (*R. H. 2 W. 4, r. 44*). If the plaintiff craving oyer of a deed, &c. do not afterwards set it forth in his replication, &c., the defendant in his rejoinder, &c. may (if he wish to have it set forth) pray that the deed be inrolled, and then set it forth, or at least such parts of it as relate to the matters in dispute (p).

(n) *Waugh v. Russell*, 5 Taunt. 707, 1 Marsh. 214, S. C.; and see *Wilson v. Woolfries*, 6 M. & Sel. 341; *Snell v. Snell*, 4 B. & C. 741, 7 D. & R. 249, S. C.; *Ross v. Parker*, 2 D. & R. 662, 1 B. &

C. 358, S. C.

(o) *Anon.* 3 Salk. 119; *Longavill v. Hundred of Thistleworth*, 6 Mod. 27; *Jeffery v. White*, Dougl. 476.

(p) Com. Dig. Pleader, P. 1.

## CHAPTER XIV.

## COPIES AND INSPECTION, &amp;c. OF INSTRUMENTS.

It should be premised, that, by the recent stat. 3 & 4 W. 4, c. 42, s. 15, a power is given to the Judges to make regulations by general rules or orders, as to the inspection, &c. of written or printed documents; at present, however, no such rules or orders have been made.

Where a *plaintiff* declares upon a written instrument not under seal, or where the action is founded upon such an instrument, the defendant may have a copy of it, by taking out a summons before a Judge at Chambers, who will thereupon make an order that a copy of the instrument in question be forthwith delivered to the defendant or his attorney, and that all proceedings in the action be stayed in the mean time (a). This is analogous to oyer of deeds, &c. Also, in policy causes, a Judge at Chambers will make an order for the assured to produce to the underwriters, upon affidavit, all papers in his possession relative to the matters at issue (b). In other cases, the Court have even ordered the plaintiff to produce his books at the trial (c); and Lord Mansfield is said to have laid it down as a rule, that, whenever a defendant would be entitled to a discovery, he should have it here, without going into equity (d). The Court, however, will not at present interfere to this extent (e), unless perhaps in insurance causes, as above mentioned; and therefore, in an action to try the title to land, the Court refused a rule to compel the plaintiff, or his landlord, to permit the defendant to inspect or take a copy of one of the landlord's title deeds to the estate (f). But if it appear that a discovery is necessary to the defence, they will give the defendant a further time to plead, to enable him in the mean time to obtain the discovery by a bill in equity (g). The Court have refused to compel the plaintiff to give or allow defendant to take a copy of an agreement, to enable him to plead in abatement that the agreement was signed jointly by himself and others (h). In an action for freight and demurrage by ship-owners against the charterer, the

(a) Tidd, 589, 591; Imp. B. R. 286; *Threlfall v. Webster*, 7 Moore, 559, 1 Bingh. 161, S. C.; *Blogg v. Kent*, 6 Bingh. 614; *Suister v. Coell*, 1 Sid. 396; *Whitaker v. Izod*, 2 Taunt. 114.

(b) *Golemidit v. Maryatt*, 1 Camp. 562, 19 Geo. 2, c. 37, s. 6.

(c) *Goater v. Nunnely*, 2 Str. 1130; but see *Whitter v. Cazalet*, 2 T. R. 683.

(d) Tidd, 591.

(e) See *Whitter v. Cazalet*, 2 T. R.

683; *Hildyard v. Smith*, 1 Bingh. 451; *Threlfall v. Webster*, 7 Moore, 559, 1 Bingh. 161, S. C.; *Hatchette v. Bleasby*, 3 Bingh. 148, 10 Moore, 523, S. C.; *Cocks v. Nash*, 9 Bingh. 723.

(f) *Pickering v. Noyes*, 1 B. & C. 262, 2 D. & R. 396, S. C.; and see *Hildyard v. Smith*, 1 Bingh. 451, 8 Moore 586, S. C.

(g) *Whitter v. Cazalet*, 2 T. R. 683.

(h) *Boule v. Bird*, 2 D. & R. 419.

Court of Common Pleas would not grant the latter an inspection of the log-book kept during the voyage (*i*). In an action on an instrument, of which plaintiff is not bound to make profert, the Court will not compel him to grant an inspection of it, on the ground that the defendant suspects it to have been forged (*k*).

Also, where the *defendant* is possessed of any written instrument, of which it is material that the plaintiff should have inspection, the Court, or a Judge in some cases, under particular circumstances, will order that the plaintiff may have leave to inspect it; that the defendant shall give him a copy of it at his (the plaintiff's) expense; and that the defendant shall produce it at the trial, if called upon to do so (*l*); or that he shall produce it to the plaintiff's attorney, in order that he may ascertain the names of the witnesses so as to subpoena them (*m*). But in another case the Court said they would not compel the defendant to produce the deed at the trial (*n*). In a recent case, in an action against the marshal for an escape, the Court compelled him or his officer to permit the plaintiff to inspect the writ of *habeas corpus* and return, and the *committitur* indorsed thereon (*o*). In an action against a sworn broker of London for negligence in making a contract, the Court on motion compelled him to produce his books, to enable the plaintiff to inspect and take a copy of the contract (*p*). But in an action for goods sold and delivered, the Court would not compel a defendant to allow an inspection of the goods, to enable the plaintiff to give evidence of their identity (*q*). The Court of Common Pleas have refused to a plaintiff in replevin inspection of a deed in the avowant's possession, which conveyed to the avowant the reversion of the demised premises (*r*). In that Court, where two parts of an indenture were executed by both parties, *each keeping one*, and one part was lost, the Court would not compel the other party to produce his part, in order to support an action against him on the instrument (*s*). A new trial having been granted, the Court allowed the plaintiff to have the inspection of a deed read in evidence by the defendant at the first trial, but not of a deed produced there but not read (*t*). In policy causes, where the plaintiff consents to enter into

(i) *Rundle v. Beaumont*, 1 M. & P. 396, 4 Bingh. 537, S. C.

(k) See *Hilliard v. Smith*, 8 Moore, 286, 1 Bingh. 451, S. C.; *Threlfall v. Webster*, 7 Moore, 559, 1 Bingh. 161, S. C.; and so, in the case of a deed of which profert is made, *Chetwynd v. Marnell*, 1 B. & P. 271; *sed vide Anon.*, cited in 8 Moore, 586.

(l) See *Morrow v. Saunders*, 1 B. & B. 318, 3 Moore, 671, S. C.; *Pickering v. Noyes*, 2 D. & R. 386; Barnes, 439; Tidd, 592; *Blakey v. Porter*, 1 Taunt. 386; *Bateman v. Phillips*, 4 Id. 157, 161; *King v. King*, Id. 666.

(m) *Anon.* 2 Chit. Rep. 230, 2 Camp. 95, n.

(n) *Doe v. Slight*, 1 Dowl. P. C. 163.

(o) *Fox v. Jones*, 7 B. & C. 732, 1 M. &

R. 570, S. C. See *Cooper v. Jones*, 2 M. & Sel. 269.

(p) *Browning v. Aylwin*, 7 B. & C. 204; but see *Rowe v. Howden*, 1 M. & P. 334, 4 Bingh. 539, S. C.

(q) *Bell v. Taylor*, 6 D. & R. 398.

(r) *Brown v. Rose*, 6 Taunt. 283; and see *Rex v. The Sheriff of Chester*, 1 Chit. Rep. 476; *Davies v. Brown*, 9 Moore, 178; *Ratcliffe v. Bleasby*, 3 Bingh. 148, 10 Moore, 523, S. C.; *Rundle v. Beaumont*, 4 Id. 537, 1 M. & P. 396, S. C.; *Cocks v. Nash*, 9 Bingh. 723.

(s) *Street v. Brown*, 6 Taunt. 302, 1 Marsh. 610, S. C.; *Woodcock v. Worthington*, 2 Y. & J. 4; *Lord Portmore v. Goring*, 4 Bing. 152.

(t) *Hewitt v. Piggott*, 7 Bing. 400, 5 M. & P. 252, 1 Dowl. P. C. 219, S. C.

a consolidation rule, terms are generally imposed on the defendant to produce all books and papers material to the point in issue (u).

Under a Judge's order to produce papers and give copies, the Court have holden that it is sufficient to give extracts of such parts of letters as are relevant to the subject, if the party in whose possession they are will make affidavit that the residue of their contents does not relate to the subject (x).

A party may also in general, on application to the Court or a Judge, get a rule or an order on the opposite party to produce a deed before the commissioners of the stamp office to be stamped (y). And in a late case, where the defendant had surreptitiously obtained possession of an unstamped instrument executed by himself and the plaintiff, (thereby preventing the plaintiff from affixing a stamp as he had intended within twenty-one days after execution), and then swore that he had lost the agreement; the Court of Common Pleas ordered that he should produce a copy in his possession to the plaintiff; and that, if the plaintiff produced that copy stamped at the trial, the defendant should be precluded from producing the original (z). But the Court will not order the production where the instrument is between parties not parties to the action, and where it might interfere with their rights or liabilities (a).

Before making the application, a demand of the copy or inspection should in general be made, and a refusal obtained. The application should be made to the Court on motion, or to a Judge at Chambers, on summons. It should be supported (except in simple cases before a Judge at Chambers) by an affidavit (b) fully stating and explaining the facts and reasons to ground the application. It is not in general necessary that the affidavit should disclose the nature of the action (c).

As to the inspection of corporation books, and the books of public companies, see *Vol. 1*, 238: and *see Corporation of Barnstable v. Lathey*, 3 T. R. 303; *Rex v. Babb*, *Id.* 579; *Imperial Gas Company v. Clarke*, 4 M. & P. 727, 7 Bing. 95, S. C.; *Mayor of Southampton v. Graves*, 8 *Id.* 590; *Mayor of Lynn v. Denton*, 1 *Id.* 689; 32 G. 3, c. 58, s. 4; *Schuldham v. Burniss*, 1 Cowp. 192; *Rex v. Purnell*, 1 W. Bl. 37, 1 Wils. 239, S. C.; *Rex v. Nottingham*, 1 W. Bl. 59; *Rex v. Heydon*, *Id.* 351; *Hodges v. Atkis*, 2 *Id.* 877, 3 Wils. 398, S. C.; *Rex v. Hostmen in Newcastle-upon-Tyne*, 2 Str. 1223; *Rex v. Cornelius*, *Id.* 1210; *Harrison v. Williams*, 3 B. & C. 162, M. & R. 820, S. C. As to the inspection of parish books, see *Anon.* 2 Chit. Rep. 290; *Newell v. Simpkin*, 4 M. & P. 394, 6 Bing. 565, S. C.; *Rex v. Great Farringdon*, 9 B. & C. 541; *Edwards v. Bennett*, 3 M. & P. 749, 6 Bing. 230, 3 Y. & J. 458, S. C.; *R. v. Justices of Buckinghamshire*,

(u) Park. Ins. 6th ed., Introduction, xlv.

(x) *Clifford v. Taylor*, 1 Taunt. 167; *Ramsbotham v. Cooper*, 2 Chit. Rep. 231.

(y) *Cooke v. Stocks*, Tidd, 9th ed. 487; *Bateman v. Phillips*, 4 Taunt. 157; *Gigney v. Bayley*, 5 Moore, 71; *Threlfall v. Webster*, 1 Bingh. 161; *Munn v. Godbold*, 3 Bingh. 292; *Neale v. Swind*,

2 C. & J. 278, 1 Dowl. P. C. 314, S. C., and cases there cited in note.

(z) *Bousefield v. Godfrey*, 5 Bingh. 418, 2 M. & P. 771, S. C.

(a) *Lawrence v. Hooker*, 5 Bingh. 6, 2 M. & P. 9, S. C.; *Taylor v. Osborne*, 4 Taunt. 159, n.

(b) See a form, Chit. Forms, 687.

(c) *Morrow v. Saunders*, 3 Moore, 871, 1 B. & B. 318, S. C.



8 B. & C. 375;—and of other books and instruments not strictly private, see *Crew v. Saunders*, 2 Str. 1005; *Murray v. Thornhill*, Id. 717; *Rex v. Worsenham*, 1 L. Raym. 705; *Cox v. Copping*, Id. 337, 5 Mod. 395, S. C.; *Allen v. Tap*, 2 W. Bl. 850; *Young v. Lynch*, 1 Id. 27; *Warriner v. Giles*, 2 Str. 954; *Wilson v. Rogers*, Id. 1242; *Reg. v. Mead*, 2 L. Raym. 927; *R. v. Holland*, 4 T. R. 691;—and as to the inspection of court rolls, see Vol. 1, 236; *Addington v. Clode*, 2 W. Bl. 1030; *Folkard v. Hemet*, Id. 1061; *Rex v. Allgood*, 7 T. R. 746; *Rogers v. Jones*, 5 D. & R. 484. By the late rule of H. T. 2 W. 4, an order upon the lord of a manor to allow the usual limited inspection of the court rolls on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for, and been refused inspection. To obtain this inspection of public books, there must be a *demand to inspect* made on the proper officer, and a refusal. The rule is obtained on motion grounded on affidavit stating the circumstances. In general the motion cannot be made until issue joined (d). Where there is no action pending, the motion is for a *mandamus* (e).

(d) *Hodges v. Atkis*, 2 W. Bl. 877, 3 Wils. 398, S. C.

(e) See *Rex v. Tower*, 4 M. & Sel. 162

## CHAPTER XV.

## PARTICULARS OF DEMAND OR SET-OFF.

*In what cases.*] IN all cases where the declaration contains counts in *indebitatus assumpsit*, or *debt on simple contract*, the plaintiff should deliver with the declaration (if delivered), or with the notice of declaration (if the declaration be filed), *full particulars* of his demand under those counts, where such particulars can be comprised *within three folios*; and where the same cannot be comprised within three folios, he should deliver such a *statement of the nature of his claim*, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios; and if he omits doing so, and a Judge afterwards orders a delivery of particulars, the plaintiff will not be allowed any *costs* in respect of any summons for the purpose of obtaining such orders, nor of the particulars he may afterwards deliver. (*R. T. 1 W. 4*).

Independently of this it may be laid down as a general rule, that in all actions in which the plaintiff declares generally, without specifying the particulars of his cause of action, a Judge *upon application* will order him to give the defendant the particulars in writing, and that all proceedings be stayed in the mean time. Thus, in debt on bond conditioned for the performance of covenants, or to indemnify, or the like, the defendant may call for a particular of the breaches for which he is sued (*a*). So, in covenant for not repairing, &c. the defendant may claim particulars of the non-repairs, &c. So, in an action by vendee against vendor, where it was stated in the declaration that the abstract of title delivered was "insufficient, defective, and objectionable," the Court obliged the plaintiff to give a particular of all objections to the abstract arising upon matters of fact (*b*). So, in an action by vendee to recover back his deposit, because the conditions of the sale had not been complied with, the defendant may have a particular of the grounds on which the plaintiff seeks to recover (*c*). But wherever the particulars of the cause of action are fully specified in the declaration, as in actions on the case, special assumpsits, or the like, any further particulars would of course be unnecessary, and are seldom granted.

In actions for *torts*, it is generally the practice to refuse particulars of demand, which in most cases are comprised in the declaration. But, under circumstances, a Judge will in such actions compel a delivery of particulars. In an action against the marshal for an escape,

(a) *Tidd*, 597.

(b) *Collett v. Thompson*, 3 B. & P.

246.

(c) *Squire v. Tod*, 1 Camp. 293.

a Judge will, on application, compel a delivery of particulars of the escape for which the action is brought (*d*). In several recent instances, in actions of trespass to goods, or trover, Judges have compelled a delivery of particulars of the goods.

In ejectment, if the defendant have any doubt as to the lands, &c. for which the ejectment is brought, he may oblige the plaintiff to give him a bill of particulars (*e*); or, where the ejectment is brought for a forfeiture, the Court, upon application, will rule the lessor of the plaintiff to give the defendant a particular of the covenants and breaches, &c. on which he means to insist that the defendant has forfeited his term, and that he shall not be allowed to give evidence at the trial of any thing not contained in those particulars (*f*).

Also, where the defendant pleads or gives notice of *set-off*, the plaintiff may obtain a particular of the set-off, in the same cases as a defendant would be entitled to it, if the matter so set off were declared upon; and if the defendant, in such a case, do not deliver a bill of particulars within the time limited in the Judge's order for that purpose, he will not be allowed to give evidence of his set-off at the trial.

*How obtained, and proceedings before the delivery of.*] We have already seen, that, in declarations containing *indebitatus* counts in assumpsit, or debt on simple contract, the plaintiff should deliver the particulars of the demand under those counts at the time of filing or delivering the declaration. Should he neglect to do so, under such a declaration, and in other cases where you are entitled to the particulars, the mode of obtaining them is, *by taking out a Judge's summons for that purpose, and obtaining an order thereon*. This may be done even before the defendant has appeared, (*R. H. 2 W. 4, r. 47*) (*g*), or after declaration and before plea pleaded. It is, indeed, discretionary with the Judge to make an order at any time before the trial (*h*). If good cause be not shewn against it, at the time specified in the summons, the Judge will make an order that the plaintiff's attorney or agent shall deliver to the defendant's attorney or agent the particulars required, and that in the mean time all further proceedings in the cause be stayed (*i*).

The term of pleading issuably will, in general, be imposed on the defendant by the order, unless expressly waived in writing by the plaintiff's attorney; (*R. H. 50 G. 3*); or unless the justice of the case requires a dispensation with such term, as, if the defendant be desirous of pleading in abatement a nonjoinder of a party, which is not regarded as other dilatory pleas. Sometimes the Judge will impose other terms on the defendant.

When the order has been drawn up and served, it operates as a stay

(*d*) *Webster v. Jones*, 7 D. & R. 774.

(*e*) *Goodright v. Rich*, 7 T. R. 332, n.

(*f*) *Doe v. Birch*, 6 T. R. 587; *ante*, 3.

(*g*) 1 Chlt. Rep. 724; and R. T. 2 G.

4, C. P., 6 Moore, 211. See form of summons, Chlt. Forms, 689.

(*h*) See Imp. K. B. 239.

(*i*) See forms, Chlt. Forms, 689, 690.

of proceedings from the time of such service till the particulars have been delivered (*j*). Under the usual order, the defendant cannot sign judgment of *nonpros*, though the plaintiff neglect or refuse the delivery of the particulars; neither will the Court give him liberty to sign such judgment (*k*); and this, although the order direct the particulars to be delivered in a specified time (*l*). The defendant's course, in such cases, is, to obtain a further order, compelling the plaintiff to deliver them in a specified time, and expressly reserving to defendant the liberty of signing judgment of *nonpros*, if not delivered within it.

A particular of the defendant's set-off is obtained by taking out a Judge's summons for that purpose. A Judge may make the order at any time before the trial. The order requires the particulars to be delivered within a certain time, otherwise that the defendant shall not be allowed to give evidence of them at the trial (*m*). If the defendant neglect to give the particulars within the time required by the order, he will not be allowed to avail himself of his set-off at the trial, as above mentioned.

*Form of, and proceedings subsequent to delivery.*] The particulars, if delivered at the time of filing or delivering a declaration under the common *indebitatus* counts in assumpsit, or debt on simple contract, should be a *full particular* of the claim under those counts, and, if possible, should be comprised *within three folios*; but, if the full particulars cannot be comprised within three folios, then the plaintiff should deliver *such a statement of the nature of his claim*, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios, otherwise the plaintiff would not be allowed the costs of the excess of the three folios. (*R. T. 1 W. 4*) (*n*).

The particulars must be explicit, and should in general specify items, dates, and amounts. It has been held, that, if money have been paid on account, the particulars should specify it, and state the balance for which the plaintiff seeks to recover (*o*); and that stating the debtor side of the account only, would be considered a contempt, for which the attorney would probably be ordered to pay the costs of both parties (*p*): but these decisions are certainly not conformable with the practice; and there seems no good reason why the plaintiff is bound, in his particulars, to notice payments or sets off, which are more peculiarly in defendant's knowledge, and constitute his defence to the action. Delivering a particular as general as the declaration, would probably be deemed a contempt of the order, and subject the

(*j*) *St. Hanlaire v. Byam*, 4 B. & C. 970; *Glover v. Watmore*, 5 B. & C. 769, 8 D. & R. 607, S. C.; *Wilson v. Hunt*, 1 Chit. Rep. 647.

(*k*) *Burgess v. Swayne*, 7 B. & C. 486; *Somers v. King*, 7 D. & R. 125.

(*l*) *Sutton v. Clarke*, 8 Bingh. 166, 1 M. & Scott, 271, 1 Dowl. P. C. 259, S. C.

(*m*) See *Lovelock v. Chevelay*, Holt, 552. See form of order, Chit. Forms, 692.

(*n*) And see the forms of particulars, Chit. Forms, 688, 689.

(*o*) *Mitchell v. Wright*, 1 Esp. 280. See 2 Esp. 602.

(*p*) *Adlington v. Appletton*, 2 Camp. 410.

attorney to costs (q). There is no objection, however, when an account has been already delivered, to refer to it generally in the particulars, without restating the items of it (r). These rules, at all events, are not to be considered as applicable to cases where the plaintiff cannot, in pursuance of the above rule of *T. T.* 1831, comprise the particulars in three folios when delivering a particular in pursuance of that rule (s).

The particulars, when made out, should be delivered to the opposite attorney.

If the particulars be incorrect, the party who delivered them may have leave to amend them; or, if not sufficiently explicit, the other party may take out a summons and obtain an order for *better particulars* (t). The delivery of a second or further particulars, in order to cover a defect in the first particulars, will not avail the party delivering them, unless delivered under such an order (u). No summons for further particulars should be granted, unless the last previous order for particulars be first drawn up, and such order produced at the time of applying for such summons. (*R. H.* 59, *G.* 3, *K. B.*)

The defendant has the same time to plead after the delivery of the particulars as he had when the summons for them was returnable; but plaintiff cannot sign judgment for want of a plea till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the Judge. (*R. H.* 2 *W.* 4, *r.* 48; and see *ante*, *Vol.* 1, *p.* 195, 496) (v). Where an order for particulars and an order for time to plead have been obtained, the time for pleading will run on, although no particulars are given, unless it is expressed in the order for time to plead, that it is not to begin to run until after the delivery of the particulars (x). As to what plea the defendant may plead if bound to plead issuably, and which he is in general bound to do by the order for particulars, see *ante*, *Vol.* 1, *p.* 200.

At the time of entering the *nisi prius* record with the Judge's marshal, the plaintiff's attorney should annex to it a copy of the particulars of the demand, and of the defendant's set-off (if any). (*R. T.* 1 *W.* 4, *r.* 6; *ante*, *Vol.* 1, *p.* 265). This will save the necessity of the opposite party's proving the order for the delivery of the particulars, in cases where he may be desirous of confining the party delivering the particulars to the proof of the items contained therein (y). If the plaintiff annex to the record particulars varying from those delivered to the defendant, and the defendant is prepared at the trial to prove the delivery of the particulars to him, the defendant might nonsuit the plaintiff, if he is unable

(q) See *Brown v. Watts*, 1 Taunt.

Stark. 224.

(r) *Hatchett v. Marshal, Peake*, 172; 1 Wightw. 78.

(u) *Brown v. Watts*, 1 Taunt. 353.

(v) *Mowbray v. Scuberth*, 3 East, 508. See *Adams v. Drummond*, 1 Dowl. P. C. 99.

(s) See the forms, Chit. Forms, 688 to 689.

(x) *Adams v. Drummond*, 1 Dowl. P. C. 99.

(t) Tidd, 589, 599. See *Hurst v. Waskie*, 1 Camp. 69, n.; *Millwood v. Waller*, 2 Taunt. 224; *Brown v. Hodgson*, 4 Taunt. 189; *Hunter v. Welsh*, 1

(y) *Macarthy v. Smith*, 8 Bingham. 146, 1 M. & Scott, 227, 1 Dowl. P. C. 253, S. C.

to give in evidence any cause of action included in the particulars delivered; or if not prepared with such proof of the delivery of the particulars, the defendant would be entitled to a new trial, and the plaintiff's attorney might be made to pay the costs of the former trial (x).

At the trial, the party who delivered the particulars will be confined in his proof to the items therein contained. Thus, where the particulars stated the plaintiff's demand to be for goods sold and delivered to the defendant, the plaintiff was not allowed at the trial to give evidence of goods sold by the defendant as agent for the plaintiff (a). So, where the particular was of a promissory note only, and when the note was produced at the trial it was found to be written on an improper stamp, the Court held that the plaintiff was precluded from resorting to recover upon the consideration for the note (b); but, under such a particular, after proving the note at the trial, the plaintiff may recover interest on it (c). Where the declaration contained three counts on three bills of exchange, but the particulars stated only that the action was brought to recover the money due on the bill in the first count, it was considered that the plaintiff could not recover on the bills mentioned in the second and third counts (d). It has been held, that, under a particulars for goods sold and delivered, the plaintiff could not recover for money had and received, although it appeared that the goods had been delivered to the defendant as agent, for sale or return, and that he had sold them and received the value (e), though indeed this decision appears questionable (f). Where the plaintiff's particular stated various sums of money due by the defendant, but some of which were in fact owing from the defendant and his partner, and not from the defendant alone, and the defendant pleaded the nonjoinder in abatement; the plaintiff was not allowed to give evidence of those due from the defendant solely, because they were not distinguished from the others in the bill of particulars (g).

As the object, however, of this strictness is, that the opposite party may know what will be attempted to be proved against him at the trial, and may prepare his evidence accordingly, a mistake in the particular, not calculated to deceive or mislead him, will not be deemed material (h). Thus, an error in the date of one of the items in a bill of particulars, as, where work and labour was stated to have been performed in a certain month, which was in fact performed in another month, was holden to be immaterial, because it could not

(z) *Morgan v. Harris*, 1 Dowl. P. C. 570, 2 C. & J. 461, S. C.

(a) *Holland v. Hopkins*, 2 B. & P. 243, 3 Esp. 168, S. C.

(b) *Wade v. Reasly*, 4 Esp. 7; *Brown v. Watts*, 1 Taunt. 353.

(c) *Blake v. Lawrence*, 4 Esp. 147.

(d) *Duncan v. Hill*, 2 B. & B. 684; but this decision, according to that in *Cooper v. Amos*, 2 C. & P. 207, post,

778, seems questionable.

(e) *Macarthy v. Smith*, 8 Bingh. 145, 1 M. & S. 227, S. C.

(f) See *Lambirth v. Roff*, Id. 411.

(g) *Colson v. Selby*, 1 Esp. 452, 2 Sel-  
lon, 339, S. C.

(h) *Lambirth v. Roff*, 1 M. & Scott,  
597, 8 Bing. 411, S. C.; *Harrison v.*  
*Wood*, 1 M. & Scott, 536, 8 Bingh.  
371, S. C.

have misled the defendant (*i*). So, where the particular specified a bill for 60*l.*, bearing date on a certain day, and the evidence was of a bill for 63*l.*, dated on a different day, in the same year and month, Abbott, J. held the variance to be immaterial (*i*). So, where a payment made on account of the defendant to A. was stated in the particulars to have been made to B., Lord Ellenborough said he should hold it to be immaterial, unless the defendant would make affidavit that he was misled by the particulars (*k*). So, where the action is for money had and received to the use of the bankrupt, and the particulars for money had and received to the use of the plaintiffs as assignees (*l*). So, in an action against an agent for not accounting for goods delivered to him by the plaintiff to be sold, and for goods sold, and money had and received, and the particulars were headed, "A. to B.—*tierces of porter, &c. —l.*" and contained also items for money had and received, they were held to be applicable to any of the counts in the declaration (*m*). So, in an action by a carrier, who had misdelivered certain goods to the defendant, which the latter appropriated to his own use, the carrier having paid the amount of the goods to the real owner, it was held that he might recover on the count for money paid, although his particulars were only "To seventeen firkins of butter, 55*l. 6s.* (*n*). Disbursements have been held recoverable under an item in the particulars for "cash advanced (*o*). So, where, in debt for rent, the plaintiff in his particular described the premises as being in a different parish from that in which they were really situate, the Court held the mistake to be immaterial, as the defendant could not have been misled by it (*p*). So, in ejectment to recover premises forfeited by non-payment of rent, a variance between the amount of rent proved to be due, and the amount demanded in the particulars, was holden not to be material (*q*). Also, although the plaintiff is confined in his probf to the items contained in his bill of particulars, yet if it appear from the defendant's evidence that he is entitled to recover for items not included in the bill, he shall recover for such items (*r*). But, where, in an action for lottery tickets sold, the particulars of the defendant's set-off mentioned the sale of the tickets to himself, it was held that this was not sufficient proof of the sale, and that the fact must be proved by other evidence (*s*). It seems also, that, where the particulars need not be given as to some counts,

(i) *Milwood v. Walter*, 2 Taunt. 224; *Harrison v. Wood*, 8 Bingh. 371.

(j) Manning's Index, 240.

(k) *Day v. Bower*, 1 Camp. 69, *n*. See *Lambirth v. Roff*, 1 M. & Scott, 597, 8 Bingh. 411, S. C.

(l) *Tucker v. Barrow*, 1 M. & M. 137.

(m) *Hunter v. Welch*, 1 Stark. 224; *sed vide Macarthy v. Smith*, 8 Bingh. 145, 1 M. & Scott, 227, S. C.

(n) *Brown v. Hodgson*, 4 Taunt. 189; *sed vide Macarthy v. Smith*, 1 M. & Scott, 227, 8 Bing. 145, S. C.

(o) *Harrison v. Wood*, 1 M. & Scott, 536, 8 Bingh. 371, S. C.

(p) *Davies v. Edwards*, 3 M. & Sel. 380; and see *Lambirth v. Roff*, 8 Bingh. 411, 1 M. & Scott, 597, S. C.

(q) *Tenny v. Moody*, 10 Moore, 252, 3 Bingh. 3, S. C.

(r) *Hurst v. Watkis*, 1 Camp. 68. See 1 Phil. Evid. 182; Rosc. 39; *Hal-land v. Hopkins*, 2 B. & P. 243.

(s) *Miller v. Johnson*, 2 Esp. 602; *Harrington v. Macmorris*, 5 Taunt. 229; *sed quare*, and see *Rymer v. Cook*, 1 M. & M. 86, *n*.

the omission in them of those causes of action will not be material; thus, where the first count was on a bill of exchange for 40*l.*, and the second on a bill for 20*l.*, and the third for goods sold, and the particulars specified only the 20*l.* bill and the goods, per Abbott, C. J. "That is no objection. If the bill is specified in the declaration, it need not be mentioned in the particulars. You must give a particular of goods sold, but you never need give a particular of bills of exchange if they appear in the declaration" (*t*). But where the plaintiff declared upon three bills of exchange, but sought by his particular to recover on the bill set out in the first count only, it was holden that he might give the other two bills in evidence, to prove a collateral matter, namely, the partnership of the defendants (*u*); but it was considered that he could not give them in evidence as a substantive cause of action (*x*). The plaintiff may give evidence of a demand contained in the particulars, though he omitted to include it in a bill delivered before action brought (*y*). But this would in most cases operate against him in evidence as to the additional items; and the delivery of a former bill is conclusive evidence against an increase of charge on any of the same items contained in a subsequent bill (*z*).

No proof of the order for, or delivery of, the particulars of demand or set-off is requisite at the trial, when they have been annexed to the record (*a*). When not so annexed, in order to prove the particulars at the trial, the Judge's order, together with the particulars, should be produced, and some evidence given of the plaintiff's attorney's or agent's signature to the latter (*b*).

(*t*) *Cooper v. Amos*, 2 C. & P. 267.

(*u*) *Duncan v. Hill*, 2 B. & B. 682.

(*x*) *Id.*

(*y*) *Short v. Edwards*, 1 Esp. 374.

(*z*) See *Loveridge v. Botham*, 1 B. &

P. 49.

(*a*) *Macarthy v. Smith*, 8 Bingh. 145,

1 M. & Scott, 227, 1 Dowl. P. C. 253,

S. C., *ante*, 776.

(*b*) See Rosc. 40; 1 Phil. Evid. 183.



## CHAPTER XVI.

## COMPOUNDING PENAL ACTIONS.

*In what cases.*] In all actions by *common informers* for penalties upon any statute, the Court, upon application, may give the plaintiff leave to compound with the defendant. (18 *El. c. 5, s. 3; 6*). No composition can be made, unless by the order and consent of the Court in which the suit is pending, under pain of 10*l.*, and of being ever afterwards disabled from suing in any popular action. (*Id.*) (*a*). This leave of the Court, however, is not necessary in actions by the party grieved (*b*). It is entirely in the discretion of the Court to grant this leave or not (*c*). And the Court have refused to grant it in an action on the 25 *G. 2, c. 36*, for keeping a disorderly house, &c. (*d*); they have also refused it in an action where part of the penalty was given to the poor (*e*).

*How and when.*] The composition is made on the consent of the parties. No composition can be made before the defendant has pleaded. (18 *El. c. 5, s. 3*). And the Court will seldom allow of it after verdict, unless circumstances be stated to them upon the part of the defendant, which entitle him to such an indulgence (*f*), as where the defendant is very poor, &c. (*g*).

The motion for this purpose is grounded on an *affidavit*, stating shortly the substance of the declaration and plea, and the sum for which the parties have agreed to compound the action (*h*). Deliver a brief to your counsel "to move for leave to compound." A brief must also be given to counsel for the other party, to consent to a rule being made. The application must be made to the Court in bank, or to a Judge sitting for the Court in bank; (1 *W. 4, c. 70, s. 1*); and not at *Nisi Prius* on the trial of the cause (*i*). In cases where part of the penalty goes to the crown, before making the application, you must give a notice to the master of the crown office, of the intention to make the same. (R. H. 2 *W. 4, r. 99*). It seems, also, that, where the crown is entitled to a part of the penalty, the consent of the crown must be signified through the medium of a king's counsel (*j*).

(a) See *Rex v. Crisp*, 1 B. & Ald. 282; *Williams v. Hedley*, 8 East, 378; *Howard v. Sowerby*, 1 Taunt. 103; *Sheldon v. Mumford*, 5 Id. 268.

(b) *Kirkham v. Wheeley*, 1 Salk. 30.

(c) See *Maughan v. Walker*, 5 T. R. 98; *Howell v. Morris*, 1 Wills. 79; *Anon.* Id. 130.

(d) *Bellis v. Beale*, Tidd, 9 ed. 557,

*Wood v. Johnson*, 2 W. Bla. 1157.

(e) *Hunson v. Sprange*, 2 Smith Rep. 195.

(f) *Crowder v. Wagstaff*, 1 B. & P. 18; *Maughan v. Walker*, 5 T. R. 98.

(g) *Bradshaw v. Mottram*, 1 Str. 167.

(h) See the form, Chit. Forms, 693.

(i) *Lee v. Cary*, 1 Chit. Rep. 381.\*

(j) *Sheldon v. Mumford*, 5 Taunt. 268.

*If the Court grant the rule, it is absolute in the first instance. You must then, in cases where he is entitled to it, pay the king's half of the composition to the master of the crown office; (R. M. 7 G. 3, k); and take his receipt for the money to the clerk of the rules, who will thereupon draw up the rule. Serve a copy of the rule on the opposite attorney. The rule must express that the defendant doth thereby undertake to pay the sum for which he has leave to compound the action; (R. E. 33 G. 3, r. 2); and if he do not afterwards pay it, the Court, upon application, will grant an attachment against him (l).*

(k) And see *Brown v. Bailey*, 4 Bur. 1929, *Lee v. Cass*, 2 Taunt. 213.

(l) *Rez v. Clifton*, 5 T. R. 257. See form of rule, Chit. Forms, 694

## CHAPTER XVII.

## SETTING ASIDE PROCEEDINGS FOR IRREGULARITY, &amp;c.

*How.*] PROCEEDINGS when irregular are set aside upon application to the Court in term time, or to a Judge. .

The motion to the Court must be founded upon an affidavit stating the irregularity complained of (*a*); and if the irregularity be in any process, a copy of such process should be annexed to the affidavit. If the Court be satisfied from the affidavit that the proceedings are irregular, they will grant a rule *nisi* (*b*); and afterwards, if sufficient cause be not shewn against it, they will make the rule absolute (*c*).

The rule *nisi*, when it states that "all proceedings shall be in the mean time stayed," suspends the proceedings for all purposes, until the rule be discharged (*d*); and therefore the time for putting in bail, for pleading, or the like, remains the same after the rule is discharged, as it was when it was granted (*e*); and pending the rule, the plaintiff cannot even take an assignment of the bail bond (*f*). In a recent case, however, a distinction has been taken between such rules obtained by a plaintiff and by a defendant: if obtained by a *plaintiff*, the defendant is allowed the same time, after the rule is disposed of, to take the next step, that he had when the rule *nisi* was served upon him; but if the rule were obtained by the *defendant*, then he must take the next step on the same day the rule is disposed of, at his peril; but he is allowed the whole of that day so to do. He will not, however, be bound to do so, if the rule *nisi* expressly provide (as it sometimes does), that the defendant shall have the same time to take the next step, after the rule is disposed of, as he had at the time he obtained it (*g*). The defendant ought, therefore, (if the rule do not contain this express provision), pending the rule, to take all proceedings essential to be completed, by the time the rule will be disposed of, such as justifying bail without prejudice, &c. (*h*).

To set aside process or proceedings for *irregularity*, the motion must be made, or the summons taken out, within a *reasonable* time, and before the party applying has taken any *fresh step* after knowledge of the irregularity. (*R. H. 2 W. 4, r. 33*) (*i*). Thus, an irregularity in the *affidavit to hold to bail*, must be taken advantage of before the time for putting in bail has elapsed—

(*a*) See Chit. Forms, 696.

(*b*) See the form, Chit. Forms, 697.

(*c*) See the forms of notice of motion to set aside proceedings for irregularity, Chit. Forms, 695, 696; and of notice to sheriff to retain money levied, *Id.* 696.

(*d*) *Swayne v. Cramond*, 4 T. R. 176.

(*e*) *Id.*

(*f*) *Id.*

(*g*) *Hughes v. Walden*, 5 B. & C. 771; *St. Hanlaire v. Byam*, 4 Id. 970, 7 D. & R. 458, S. C.

(*h*) *St. Hanlaire v. Byam*, 4 B. & C. 970, 7 D. & R. 458, S. C.

(*i*) See *Petrie v. White*, 3 T. R. 7, 10; *Downes v. Witherington*, 2 Taunt. 243.

ed (*k*). In process, an irregularity in it must be taken advantage of before appearance (*l*), and before obtaining time to put in bail (*m*), and before the declaration has been taken out of the office (*n*); and, by the defendant's attorney undertaking in writing to appear to the process served (*o*), or by receiving notice of declaration, and saying "It is all right, I will call and settle the debt and costs," the defendant waives any irregularity in the process (*p*): so he waives it by paying the debt and part of the costs (*q*), or by admitting the debt after service and requesting time to pay it (*r*). In general, however, a defendant's asking for time does not waive an irregularity in the plaintiff's last proceeding (*s*). An irregularity in an appearance by plaintiff for the defendant, must be taken advantage of before judgment by default (*t*). An irregularity in the notice of, or in filing or delivering the declaration, must be taken advantage of before plea, or even before taking out a summons to stay proceedings on the bail bond (*u*); and the application should be made, if possible, at least two days before the time appointed for the execution of the writ of inquiry (*x*). It may be observed, that taking the declaration out of the office, or obtaining time to put in bail, does not waive any irregularity as to the declaration itself (*z*). But taking the declaration out of the office waives an irregularity in its having been filed conditionally (*a*). And taking the declaration by the bye out of the office, waives an irregularity in declaring by the bye before declaring in chief (*b*). Where the declaration was irregularly delivered at the same time as insufficient particulars, and an order was obtained for better particulars, it was held, that the defendant's not returning the declaration was a waiver of the irregularity (*c*). An irregularity as to the filing of a plea would be waived by taking it out of the office; as, if the plea had been pleaded by a new attorney without an order to change attorneys (*d*). But the plaintiff's demanding a particulars of set-off will not waive the right to sign judgment as for want of a plea, where

(*k*) *Tucker v. Colegate*, 1 Dowl. P. C. 574, 2 C. & J. 489, S. C. See the prior cases, *Jones v. Price*, 1 East, 81; *Chapman v. Snow*, 1 B. & P. 132; *Robinson v. Nicolls*, 2 Str. 1077; *Reeves v. Hucker*, 2 C. & J. 45; *D'Argent v. Vivant*, 1 East, 330; *Mawman v. Whalley*, 6 Taunt. 185; *Dalton v. Barnes*, 1 M. & Sel. 230; 7 T. R. 376, n.; *Destborough v. Coppinger*, 8 T. R. 77; *Moses v. Richardson*, 8 B. & C. 421.

(*l*) *Fox v. Money*, 1 B. & P. 250; *Re v. Hare*, 1 Str. 155; *Steele v. Morgan*, 3 D. & R. 450; *Rawes v. Knight*, 1 Bingham, 132.

(*m*) *Moore v. Stockwell*, 6 B. & C. 76, 9 D. & R. 124, S. C.

(*n*) *Whale v. Fuller*, 1 H. Bl. 222; *Caswall v. Martin*, 2 Str. 1072.

(*o*) *Anon.* 1 Chit. Rep. 129; *Hompay v. Kenning*, 2 Chit. Rep. 236.

(*p*) *Lloyd v. Hawkyard*, 1 M. & R. 320.

(*q*) *Monday v. Sear*, 11 Price, 122.

(*r*) *Rawes v. Knight*, 1 Bingham, 132.

(*s*) *Anon.* 1 Dowl. P. C. 23.

(*t*) *Pr. Reg.* 32; *Williams v. Strahan*, 1 N. R. 300.

(*u*) *Davis v. Owen*, 1 B. & P. 342.

(*x*) *Paire v. Goodman*, 2 Smith Rep. 391; *Minster v. Cotes*, 2 Chit. Rep. 237. It has been held, that if the notice of declaration be served before process served, the defendant must apply before judgment to set it aside. *M'Quioick v. Davis*, 2 Chit. Rep. 164.

(*z*) *Chapman v. Eland*, 2 New Rep. 83; *Re v. Horne*, 4 T. R. 349.

(*a*) *Gilbert v. Kirkland*, 1 Dowl. P. C. 153.

(*b*) *Archer v. Barnes*, 3 East, 342; *sed quare* now, since the practice of declaring by the bye no longer exists.

(*c*) *Aspinal v. Smith*, 8 Taunt. 592.

(*d*) *Margerem v. Makilwaine*, 2 N. R. 509.

the plea is a nullity (e). An irregularity in, or omitting to give, a rule to plead, or demand of plea, is waived by the defendant's pleading; and this, although the plea be a nullity upon which the plaintiff signs judgment (f). An irregularity in the plea roll should be taken advantage of before the defendant has accepted the issue (g). By accepting the issue, or returning the paper book, the defendant's attorney admits it to have been properly made up (h). As to the time for moving to set aside a judgment by default for irregularity, see *ante*, 506. In general, an irregularity in signing the judgment would be waived by attending the taxation of costs (i). Where a defendant pleaded to a *scire facias*, pending a rule he had obtained to set it aside for irregularity, the Court held that he waived the irregularity by his plea (j). And the rule is the same as to prisoners (k); a prisoner who is supersedeable for not being declared against in time, waives the irregularity by afterwards pleading (l).

What has here been said, however, as to the time of making the application to set aside proceedings for irregularity, must be understood only of proceedings which are merely irregular; for, if a proceeding be completely defective and void, or, in other words, a nullity, the defect is not waived by any subsequent proceeding of the opposite party (m). Therefore, where the maker and indorser of a note were holden to bail in the one affidavit, the defect was holden not to be waived by putting in bail (n). So, where defendant pleaded in abatement and without a proper affidavit, and defendant signed judgment of *nonpros* for not replying thereto, it was held the judgment was irregular, and not waived by the plaintiff's paying the costs of the judgment (o).

If the party who has committed the irregularity be satisfied that he has no sufficient cause to shew against the rule, he may save some expense by serving the opposite party with a notice, acknowledging the defect, desiring him not to proceed to make the rule absolute, and offering to pay the costs already incurred (p); or, if he perceive the defect before the other party has moved for a rule to set aside the proceeding, he may prevent all expense by a similar notice (q). And in a late case, where, after service of the rule nisi to set aside a declaration irregularly delivered, the plaintiff's attorney offered to pay the costs, which the defendant refused, the Court made the rule absolute, on the terms that the defendant should pay all the costs subsequent to the offer (r).

(e) *Ford v. Bernard*, 6 Bingh. 534.

(f) *Semble, Perry v. Fisher*, 6 East, 549; and such is the practice.

(g) *Combe v. Pitt*, 1 W. Bl. 525, 3 Bur. 1682, S. C.

(h) *Shepley v. Marsh*, 2 Str. 1131; *Thompson v. Tiller*, Id. 1266; *Mather v. Brinker*, 2 Wils. 243; *Doe v. Cotterell*, 1 Chit. Rep. 277; *ante*, Vol. 1, 220.

(i) *Tidd*, 930; *ante*, Vol. 1, 319, 506.

(j) *Sloman v. Gregory*, 1 D. & R. 181.

(k) *Robertson v. Douglas*, 1 T. R. 191.

(l) *Pearson v. Raulings*, 1 East, 77, 6 T. R. 224, S. C.; *ante*, 638.

(m) See *Taylor v. Phillips*, 3 East, 156; *Osborne v. Taylor*, 1 Chit. Rep. 400; *Anon.* 2 Id. 237.

(n) *Hussey v. Wilson*, 5 T. R. 254; Vol. 1, 94.

(o) *Garrattv. Hooper*, 1 Dowl. P.C. 28; *ante*, 472, Vol. 1, 214.

(p) See form of notice, Chit. Forms, 697.

(q) See form of notice not to appear to process, Chit. Forms, 698. See Imp. K. B. 494, n.; and the case of an irregular judgment, *ante*, 507.

(r) *Bristow v. Beckett*, 4 M. & Ry.

*Costs, &c.*] If the rule be made *absolute*, it is generally with costs, unless some strong grounds be shewn to the Court for ordering it otherwise; so, if *discharged*, it is understood to be discharged with costs, unless the Court give special directions to the contrary. (*R. M.* 37 G. 3) (s). But if the rule *nisi* for setting aside the proceedings be *not moved with costs*, and the rule be made absolute, no cause being shewn, it must be made absolute in the terms in which it was moved, viz. without costs (t). On the other hand, where the rule *nisi* is moved with costs, and it be discharged, it will, in general, be so, with costs (u). The costs of an application to set aside a judgment for irregularity, which was granted without costs, cannot be recovered by way of aggravation of damages, in an action of trespass for seizing goods under colour of such judgment (x). • A Judge at chambers may, it seems, give costs (y). As to the mode of enforcing the payment of costs by attachment, *see post*, Book 4, Part 3.

In setting aside a judgment and execution for irregularity, we have seen (*ante*, 506), that the Court in general restrain the applicant from bringing any action.

*In what cases proceedings set aside.*] The particular cases in which proceedings are usually set aside for irregularity have been already noticed in the course of the work; we shall here, however, again notice some of them, and attempt to deduce from them a few general rules.

1. If any necessary proceedings have been omitted by the plaintiff, his next subsequent proceeding may be set aside for irregularity. Thus, if the defendant be arrested upon bailable process, and there have been no affidavit to hold to bail, the arrest will be set aside for irregularity, that is, the defendant will be discharged upon a common appearance, or, if he have given a bail bond, such bail bond will be ordered to be delivered up to be cancelled. (*See Vol.* 1, 93). So, if plaintiff sign judgment for want of a plea, without having given a rule to plead, or demanded a plea when necessary, the Court will set aside the judgment. (*See ante*, 505, and *Vol.* 1, 206). So, if the plaintiff proceed to trial without having given notice of trial to the defendant, the Court will set aside the verdict (if for plaintiff,) and grant a new trial (z). So, if the plaintiff sign judgment upon a *cognovit*, without entering an appearance for the defendant, the Court or a Judge will set aside the judgment (a).

100; and see *Halton v. Stockings*, 9 C. & J. 60, 2 Tyr. 165, 1 Dowl. P. C. 246, S. C., where the attorney was made to pay the subsequent costs.

(s) 7 T. R. 82; *Anon.* 1 Chit. Rep. 390, *n.*; *post*.

(t) *Per cur.* 37 G. 3, K. B.; 1 Tidd, 524.

(u) *Tilley v. Henley*, 1 Chit. Rep. 136; and see *Huggett v. Parkin*, 1 Bingh. 65; *post*.

(x) *Loton v. Deereux*, 10 Law Jour 103.

(y) *Doe d. Prescott v. Roe*, 1 Dowl. P. C. 274, 9 Bingh. 104, S. C.; *sed vide* *Read v. Lee*, 2 B. & Adol. 415, 1 Dowl. P. C. 52, S. C.; *Spicer v. Todd*, 1 Dowl. P. C. 306.

(z) *See* Bul. N. P. 327; *Douglas v. Ray*, 4 T. R. 552.

(a) *See* *Davis v. Hughes*, 7 T. R. 206.

2. If any necessary proceeding on the part of the plaintiff be not had within the time limited for it, or be had before the time appointed for it by the practice of the Court, it may be set aside for irregularity. If the plaintiff enter an appearance for the defendant after the time limited for that purpose by statute, the Court or a Judge will set aside the proceedings for irregularity (*b*). So, if judgment be signed for want of a plea before the time for pleading, the rule to plead, and 24 hours after demand of a plea, have severally expired, and the defendant has not waived the necessity for them by pleading, &c., the Court or a Judge will set aside the judgment. (*See Vol. 1, 202.*) So, if final judgment be signed before the expiration of the time limited for signing it, the Court will set it aside for irregularity (*c*).

3. So, if any necessary proceeding be informal, or not done in the manner prescribed by the practice of the Court, it may be set aside for irregularity. Thus, if the affidavit to hold to bail comprise two distinct causes of action which cannot be joined (*d*), or be otherwise informal or defective in any material part, (*see Vol. 1, 93, 94*), the Court or a Judge will discharge the defendant on entering an appearance, or order the bail bond to be delivered up to be cancelled if he have given one. (*Vol. 1, 93, 94*). So, if a judicial writ be tested (*e*), or returnable improperly, or be misdirected, (*Vol. 1, 97*), or if the name of either party be omitted in it (*f*), or if the attorney's name be indorsed on it without his authority, (*see Vol. 1, 107*) (*g*), or if there be a material variance between the first writ and the *alias* (*h*), or if there be any other material defect in it, the Court will set it aside for irregularity, and order the defendant to be discharged, or the goods seized under the writ, or the produce of them, to be returned to the defendant, as the case may require. So, if the declaration be at the suit of two plaintiffs, and the writ at the suit of one; or if the writ be against one defendant, and the declaration against two (*i*); the Court or a Judge will set aside the proceedings for irregularity. (*Vol. 1, 102*). So, if, in an action against two, the recognizance of bail be drawn up as in an action against one only, the Court will set aside the proceedings against the bail for irregularity (*k*).

4. And lastly, if any proceedings are had, which are not warranted by the particular circumstances of the case, according to the practice of the Court, or for which there is no foundation: as where an attachment is sued out against the sheriff, or proceedings had against

(*b*) *Smith v. Painter*, 2 T. R. 719. *See Davis v. Hughes*, 7 Id. 206; *ante*, Vol. 1, 453.

(*c*) *See Doe v. Hedges*, 4 D. & R. 393; *ante*, Vol. 1, 315, 316.

(*d*) *Dean and Chapter of Exeter v. Seagull*, 6 T. R. 688; *Crooke v. Davis*, 5 Bur. 2690; *Holland v. Johnson*, Id. 697; *Hussey v. Wilson*, 5 T. R. 254; Vol. 1, 90, 94.

(*e*) *Hart v. Weston*, 5 Bur. 2586.

(*f*) *Andr. 16*.

(*g*) *Oppenheim v. Harrison*, 1 Bur. 20.

(*h*) *Corbett v. Bates*, 3 T. R. 660.

(*i*) But not *vice versa*, if the plaintiff drop all further proceedings against the defendant omitted in the declaration. *Evans v. Whitehead*, 2 M. & R. 367.

(*k*) *Holt v. Frank*, 1 M. & Sel. 199.

the bail after the defendant has been rendered, and notice of render given to the plaintiff's attorney; or where judgment for want of a plea is signed after plea pleaded; or where the writ of execution is not warranted by the judgment, or the like: the Court or a Judge will set aside the proceedings for irregularity.

As to setting aside proceedings against the sheriff for irregularity, see *Vol.* 1, 142; the like, as to proceedings upon the bail bond, *Id.*; and the like, as to execution sued out pending error, *Id.* 336, 340, 341.



## CHAPTER XVIII.

## JUDGMENT OF NONPROS.

JUDGMENT of *nonpros* is a final judgment for costs only, signed by the defendant, whenever the plaintiff, in any stage of the cause, neglects to prosecute his suit or part of it within the time limited by the rules of the Court for that purpose.

*For not declaring.*] We have already noticed, (*ante*, Vol. 1, 185, 186), the time within which the plaintiff *must* declare in an action commenced by writ of summons, writ of *capias* or detainer; and that if the plaintiff do not declare within such time, or within such further time to declare as he may obtain of the Court or a Judge, the defendant may, at the expiration of *four days* next after a *written demand* of declaration served upon the plaintiff, his attorney or agent, as the case may be, sign judgment of *nonpros* (*a*). If such a demand has been made, and time to declare obtained, the defendant may sign judgment of *nonpros* without a fresh demand of declaration (*b*).

If the action be against *several* defendants, the plaintiff must be nonprosessed by all or none (*c*), even in trespass; unless the plaintiff have actually declared against some of them, or have taken out a rule for time to declare against some of them, in which case the others may sign judgment of *nonpros* (*d*). Also, where several defendants are entitled to sign judgment of *nonpros*, they can sign but one judgment, although they have appeared severally by separate attorneys (*e*).

It may be necessary here to observe, that judgment of *nonpros* must be signed within a year from the eighth day inclusive from the execution of the process, and cannot be signed afterwards (*f*).

If the defendant be taken, or appear voluntarily on the *exigi facias*, the plaintiff must declare against him within the usual time limited upon proceedings by summons or *capias*; otherwise the defendant may, four days after a declaration has been demanded in writing, sign judgment of *nonpros* (*g*). But if the defendant be outlawed, and

(a) This four days' demand is required by R. T. 1 W. 4. That rule, as far as it related to a demand of replication and subsequent pleadings, is altered by the R. H. 2 W. 4, r. 54, which makes a service of a rule to reply or plead a subsequent pleading, a sufficient demand of such replication or subsequent pleadings. See the form of the judgment, Chit. Forms, 699.

(b) *Wells v. Hare*, 1 Dowl. P. C. 366.

(c) *Philpot v. Muller*, 1 Doug. 169, n.

See *Inwood v. Mawley*, 5 D. & R. 351, 3 B. & C. 553, S. C.

(d) *Roe v. Cock*, 2 T. R. 257; *Butler v. Upton*, 1d. 259, n.

(e) *Pryce v. Foulkes*, 4 Bur. 2418; 1 Comyns, 74; *Allington v. Favasur*, 2 Salk. 455.

(f) See *Cooper v. Nias*, 3 B. & Ald. 271, 1 Chit. Rep. 669, S. C.; R. H. 2 W. 4, r. 35.

(g) See form of such judgment, Chit. Forms, 655.

afterwards come in and reverse the outlawry, although the plaintiff must declare against him (if at all) within two terms after the reversal, yet the defendant cannot sign judgment of *nonpros*, if the plaintiff fail to do so. (*See ante*, 709).

If the plaintiff in replevin do not declare before four days after the service of the rule to declare, and four days after a declaration has been demanded in writing have expired, the defendant may sign judgment of *nonpros* (h). So, if he do not declare upon a writ of second deliverance, within the time limited for that purpose, the defendant may sign judgment of *nonpros*. (*See ante*, 584).

Where a cause is removed from an inferior court by writ of *habeas corpus cum causa*, the plaintiff (if he declare at all in this Court) must declare before the end of the term next after that in which bail is put in; but judgment of *nonpros* cannot be signed if he fail to do so. (*Ante*, 723).

Before the defendant can sign judgment of *nonpros* for not declaring, he must appear to the action. Before the alteration in the process for commencing actions effected by the 2 W. 4, c. 39, he might have appeared at any time from the return of the writ till the *quarto die post*, or first day of full term in that next following the return of the writ, entering his appearance of the preceding term (i); but now that return days are no longer fixed, and the execution of process is the only criterion of the time for appearance, the defendant may perhaps be considered entitled to sign judgment of *nonpros* on entering his appearance by the last day of the term in which the plaintiff should have declared, or at any time after, provided the plaintiff have not in the mean while entered an appearance for him according to the statute (k).

*For not replying, &c.*] If the plaintiff do not reply, surrejoin, surrebut, &c. within the time limited for that purpose after service of the rule, (*see ante*, Vol. 1, 211), or specified in an order for further time, the defendant may sign judgment of *nonpros*. And even where the plea concludes to the country, if the plaintiff be ruled to reply, he must actually deliver the *similiter* within the time limited by the rule, otherwise the defendant may sign a *nonpros* (l). A demand of replication, &c. or other subsequent pleading further than the rule to reply, &c. is not requisite. (*R. II. 2 W. 4, r. 54*).

It may be observed, that a judgment of *nonpros* may be signed to any part of the suit which is not prosecuted. Thus, for instance, if the declaration contain two counts, and the defendant plead *non assumpsit* to the first count, and the stat. of limitations to the second, and the plaintiff reply to the plea of the stat. of limitations, but omit adding the *similiter* to the plea of *non assumpsit*, defendant ruling the

(h) See as to this judgment, *ante*, 583, 584. See Chit. Forms, 510 to 523.

(i) *Prigmore v. Bradley*, 6 East, 314.

(k) See Price, Pract. 283.

(l) *Hollis v. Buckingham*, 3 D. & R.

1. See forms of judgment for not replying, Chit. Forms, 703.

plaintiff to reply, and waiting four days after it, might sign a judgment of *nonpros* to the first count. But in such or any other case where the plaintiff has so replied, &c. so as to leave part only of the defence answered, then defendant could not sign judgment of *nonpros* as to the whole action, but only as to such part of it as remains not prosecuted by the plaintiff. Where the defendant pleaded by mistake the general issue to three instead of four counts, and plaintiff replied, and then defendant amended his plea by extending it to the fourth count, and plaintiff not having replied to the amended plea, although ruled so to do, defendant signed judgment of *nonpros* to the whole action, it was held that this was irregular (*m*). Where there are several defendants, and the plaintiff has declared against them jointly, he must be nonprossed as to all or none, even although they may have severed in their pleading (*n*).

In replevin, after the defendant has avowed, he may rule the plaintiff to plead, in the same manner as he is ruled to reply in other actions; and if the plaintiff neglect to plead within the time limited by the rule, the defendant may sign judgment of *nonpros*. (See as to this judgment, *ante*, 589, 590) (*o*).

As to nonprossing the plaintiff in ejectment, see *ante*, 541, 545.

*For not entering the issue.*] If the plaintiff do not bring in the record before the expiration of the rule to enter the issue, the defendant may sign judgment of *nonpros*. (*Vol. 1, 221, 222*). And where the defendant signed a *nonpros*, because the plaintiff, after being ruled to enter the issue, entered it as of the term the plea was pleaded, instead of the term of which the issue was joined, the Court refused to set aside the *nonpros* (*p*). If, however, the roll be brought in, or in other words the issue be entered, at any time before judgment is actually signed, it will be sufficient; and a judgment signed afterwards will be irregular (*q*).

The judgment in this case must be signed as of the term in which the rule to enter the issue was given; otherwise, if the cause stand over to another term, without farther proceedings, a new rule must be given before the defendant can sign judgment (*r*). And see *ante*, *Vol. 1, 222*, as to when you may rule plaintiff to enter the issue and when a term's notice is necessary.

*In error.*] If the plaintiff in error, after being ruled to transcribe, do not pay the transcript money, the defendant may sign judgment of *nonpros*. (*Vol. 1, 346, &c.*) (*s*).

In error from this Court to the Court of Exchequer Chamber, if the plaintiff do not allege diminution before the expiration of the rule

(*m*) *Dorday v. Cook*, 4 B. & C. 135.

(*n*) 1 Doug. 169; *ante*, 788.

(*o*) See Chit. Forms, 510 to 528.

(*p*) *Wood v. Miller*, 3 East, 204. See the form of entering the judgment,

Chit. Forms, 704.

(*q*) *Minns v. Barter*, 1 T. R. 16.

(*r*) *Lancaster v. Fraser*, 1 M. & Sel. 478.

(*s*) And see Chit. Forms, 210, 228.

requiring him to do so, the defendant may sign judgment of *nonpros*. (Vol. 1, 349) (t).

So, if the plaintiff in error do not assign errors within the time limited for that purpose, the defendant may sign judgment of *nonpros*. (Vol. 1, 350) (u).

And lastly, in error from this Court to the Court of Exchequer Chamber, if the plaintiff do not procure the *certiorari* to be returned within the time limited in the rule for that purpose, the defendant may sign judgment of *nonpros*. (Vol. 1, 349).

*In other cases.*] A judgment of *nonpros* cannot be signed when the proceedings have been stayed by a general order for particulars, (*ante*, 775). Where the plaintiff's proceedings in a second action are stayed until he have paid the costs of a former action, the Court will not allow the defendant to *nonpros* the second action, for nonpayment of these costs (x). On a rule to discontinue after plea pleaded, such rule containing an undertaking by plaintiff to pay the costs, and a consent, that if they are not paid within four days after taxation, the defendant shall be at liberty to sign a *nonpros*; and in such case, if the plaintiff do not pay the costs within that time, defendant may have a judgment of *nonpros* accordingly. (R. II. 2IV. 4, r. 106; *post*, 794).

*Make an incipitur on a roll of the term the judgment is to be signed, and also on a judgment paper (y). Take them to the clerk of the judgments (z), who will sign the judgment; pay him 3s. If the nonpros be signed for not declaring, the clerk of the judgments taxes the costs at 60s.; in all other cases you must get the costs taxed by the master (z), who will mark the same upon the judgment paper. After judgment signed and costs taxed, you may proceed to sue out execution.*

Also, in error *coram nobis* and in all cases of error to this court, after the record has been removed here, judgment of *nonpros* is signed as above directed; but in all other instances of *nonpros* in error, the judgment is signed by the clerk of the errors, who will also tax the costs.

*In what cases set aside.*] If the judgment be regular, it is discretionary with the Court to set it aside, upon payment of costs, in order to let in a trial of the merits. They have refused to set it aside in an action by a common informer (a).

But if the judgment be irregular, the Court will in all cases set it

(t) And see Chit. Forms, 210.

(u) See as to the forms, Chit. Forms, 210, 229, 250.

(x) *Doe d. Sutton v. Ridgway*, 5 B. & Ald. 523.

(y) See the forms referred to in preceding pages, *ante*, 788—790.

(z) In C. P. take them to the prothonotary.

(a) *Bennet v. Smith*, 1 Bur. 401.

aside with costs; and if an action or other proceedings be had upon such a judgment, one rule is all that is requisite in order to set aside such proceedings, as well as the judgment (*b*).

*Costs and execution, &c.*] The plaintiff is liable to costs in all cases, (23 *H.* 8, c. 15; 8 *El.* c. 2; 13 *C.* 2, st. 2, c. 2; 4 *J.* 1, c. 4) (*c*), excepting upon a *nonpros* for not transcribing, in error (*d*). We have already seen, *ante*, 541, 545, when the defendant in ejectment is entitled to the costs of a *nonpros*. For these costs, the defendant may either sue out execution, by *ca. sa.* or *feri facias* (*e*), or he may proceed by debt on the judgment, in which he would have a right to his costs, notwithstanding the 43 *G.* 3, c. 46, s. 4 (*f*). Under the execution you cannot levy more than the sum recovered by the judgment; consequently, the sheriff's poundage, or fees, or other expenses of the execution, cannot be levied (*g*).

*Proceedings after it.*] After being *nonprossed*, the plaintiff may commence a new action against the defendant, for the same cause; and he may again hold the defendant to bail, if the action beailable, (*Vol.* 1, 375) (*h*), and he was not arrested in the first action; but, if he were arrested in the first action, then he cannot be held to bail in the second without a Judge's order. (*R.* II. 2 *W.* 4, r. 7).

(*a*) *Davidson v. James*, 1 T. R. 370. 410. 5 Mod. R. 61, S. Gr; *ante*, 70. was liable even before the 3 & 4 W. 4, c. 42, s. 31, (*ante* 662), although he sued as executor. *Hawes v. Saunders*, 3 Bur. 1505; *Higgs v. Warry*, 6 T. R. 654. But he was not so liable before that act (sect. 34) on a judgment of *nonpros* obtained by reason of the plaintiff's having omitted to enter the issue on record, after joinder in demurrer to a plea in abate-  
 (*d*) *Salt v. Richards*, 7 East, 110. See *College of Physicians v. Harrison*, 9 B. & C. 525; Vol. 1, 347.  
 (*e*) *Murray v. Wilson*, 1 Wils. 316. See the form, Chit. Forms, 707.  
 (*f*) *Bennett v. Neale*, 14 East, 343.  
 (*g*) *Baker v. Syden*, 7 Taunt. 180; *Anon.* 2 Chit. Rep. 353.  
 (*h*) *Tarleton v. Hayes*, 1 Str. 439.

## CHAPTER XIX.

## DISCONTINUANCE.

*What, &c.*] It is unnecessary, in a work of this nature, to treat particularly of the subject of discontinuance; it is sufficient to know that it never can be the subject of objection *pendente litigato* (a); and that, after verdict, it is cured by the statute of Jeofails, 32 H. 8, c. 30 (b). See as to continuances of process, *ante*, 699. Process is continued by *vicecomes non misit breve*; or, if the process be a writ of summons under the 2 W. 4, c. 39, by the attorney's return of *non est inventus*, &c. (c), after declaration and before issue joined, the proceedings (when it is necessary that they should be so) are continued by imparlance; (see *ante*, 546, 586, Vol. 1, 195) (d); after issue joined and before verdict, by *vicecomes non misit breve* (e); after demurrer, and before judgment, by *curia advisari vult* (f); after issue joined upon *nul tiel record*, by *curia advisari* &c. (g); after verdict and before judgment, in actions tried at the assizes, and in cases of special verdicts, by *curia advisari vult* (h); after joinder in error and before judgment, also by *curia advisari vult* (i). After judgment by default, and before execution of a writ of inquiry, the proceedings used to be continued by *vicecomes non misit breve*, but now, by R. II. 2 W. 4, r. 105, the entry of such continuances is no longer requisite. These continuances are never entered until the plea roll is made up (k).

*Rule to discontinue.*] If the plaintiff find that he has misconceived his action, or that for some defect in the pleadings or other reason he will not be able to maintain it, he may obtain a rule for leave to discontinue. This indulgence, however, is granted only to plaintiffs; even an avowant in replevin cannot have it (l). The terms upon which a party is allowed to discontinue are in the discretion of the Court. It is granted always upon payment of costs. (See 8 Eliz. c. 2, s. 2) (m). Where the defendant is a justice of peace, if the plaintiff discontinue, it must be upon payment of double costs (n).

(a) *Beecher v. Shirley*, Cro. Jac. 211.

(b) See *Humble v. Bland*, 6 T. R. 255; *Wynn v. Wynn*, 1 Wils. 40; *Richards v. Brown*, 1 Doug. 115.

(c) See the form, Chit. Forms, 636.

(d) See Chit. Forms, 461.

(e) See the form, Chit. Forms, 127, 128.

(f) See the form, Chit. Forms, 365, 370, 374.

(g) See the form, Chit. Forms, 386.

(h) See the form, Chit. Forms, 196, 197, 198, 175, 193.

(i) See the form, Chit. Forms, 216, 232, 244.

(k) *Curluis v. Padley*, 1 Salk. 179; *Wilkes v. Wood*, 2 Wils. 203. See *Doe d. Mears v. Dolman*, 7 T. R. 613.

(l) *Long v. Buckridge*, 1 Str. 112.

(m) Comb. 299.

(n) See *Devenish v. Mertins*, 2 Str. 974; *ante*, 694.

*And see as to actions against officers of excise and customs, and other officers, ante, 694.*

*How, and when obtained.*] This rule may be had at any time after the commencement of the action, and before trial or writ of inquiry. The Court will in general grant this rule to discontinue after a rule for a new trial, upon the terms of plaintiff's paying the costs of the trial (*o*). The Court may probably grant it as matter of especial favour, even after a special verdict (*p*); but they will not do so in a hard action (*q*), or to give the plaintiff an opportunity to adduce fresh proof in contradiction to the verdict (*r*). Nor will they ever grant it after a general verdict (*s*), or after a writ of inquiry executed and returned (*t*), unless with the defendant's consent. The Court, however, have allowed the plaintiff to discontinue upon payment of costs after a demurrer argued and allowed, where there was a mistake in the plaintiff's pleading (*u*); and the Court now usually give the party leave to amend, upon payment of costs (*x*).

Before argument on demurrer, verdict, or execution of a writ of inquiry, this is a mere side-bar rule, and may be had as a matter of course from the clerk of the rules, (*see R. H. 2 W. 4, r. 106*); *pay him 4s.* (*y*); in other cases it is obtained upon application to the Court, and is but a rule *nisi*, which you must afterwards proceed to make absolute in the ordinary way. The rule, if obtained after plea pleaded, must contain an undertaking by the plaintiff to pay the costs, and a consent that if they be not paid within four days after taxation, defendant shall be at liberty to sign a *nonpros.* (*R. H. 2 W. 4, r. 106*) (*z*). As soon as you have obtained the side-bar rule, or rule absolute, *take it to the master, and get an appointment on it to tax the costs. Serve a copy of the rule and appointment on the defendant's attorney; and attend at the time appointed, and the master will tax the costs.* These costs should be paid forthwith, for until paid, the action is not discontinued, and the plaintiff may be compelled to proceed therein as usual (*a*). But if the rule be obtained *after plea* pleaded, and contain, as it should do, the plaintiff's consent that if they are not paid within four days after taxation, the defendant shall be at liberty to sign judgment of *nonpros*, then if they be not so paid, the defendant may sign such judgment as of course. (*See R. H. 2 W. 4, r. 106*). The plaintiff, however, is not, it seems, liable to an *attach-*

(*o*) *Sweeting v. Hulse*, 9 B. & C. 369; and see *Jackson v. Hallam*, 2 B. & Ald. 317, 1 Chit. Rep. 19, S. C.

(*p*) *Price v. Parker*, 1 Salk. 178.

(*q*) *Boucher v. Lawson*, Hardw. 200, 201.

(*r*) *Roe v. Gray*, 2 W. Bl. 815.

(*s*) *Price v. Parker*, 1 Salk. 178.

(*t*) *Stephens v. Etherick*, Carth. 86, 1 Show. 63, S. C.

(*u*) 2 Lev. 124, 209; 1 Saund. 23; 1

Str. 76, 116, 1 Saund. 39.

(*x*) 2 Saund. 73, (n. 1); *ante*, 479.

(*y*) See the forms, Chit. Forms, 710.

(*z*) See *ante*, 791. See form of rule and undertaking, Chit. Forms, 710.

(*a*) *Molling v. Buckholtz*, 3 M. & Sel. 153; *Edgington v. Bond*, 1 Dowl. P. C. 152; MS. T. 1814; *Whitmore v. Williams*, 6 T. R. 765. See *White v. Gompertz*, 5 B. & Ald. 905, 1 D. & R. 556, S. C.

ment for the non-payment of these costs (b). When the costs are taxed and paid, and the discontinuance entered, however, the judgment relates back to the day on which the rule to discontinue was obtained, and the action is considered discontinued from that time (c). When the costs are paid, the defendant may, by motion or summons and order, compel the plaintiff to enter the judgment of discontinuance and carry in the judgment roll.

*When discharged.*] It is in the power and discretion of the Court to discharge a rule to discontinue. When a plaintiff, merely because he did not like the bail in the first action, discontinued, and held the defendant again to bail in the second action; the Court considered this conduct unwarrantable, and discharged the side-bar rule, thereby leaving the first bail still liable on their recognizance (d). Yet, in another case, where it appeared clearly that the bail in the first action had forsworn themselves, and were in fact worth nothing, the Court held that the plaintiff was justified in holding the defendant to bail in a second action for the same cause, even before he had discontinued the first; for had he discontinued, it is very probable the defendant would have absconded. (*Vol. 1, 275, 376*) (e).

*New action.*] After the costs have been taxed and paid (f), the plaintiff may commence a new action for the same cause. And if the first action were upon common nonbailable process, the plaintiff may hold the defendant to bail for the same cause (if bailable) even before the first action is discontinued (g), provided he discontinue before declaring, otherwise the defendant might plead the pendency of the prior action in abatement. But if the defendant were held to bail in the first action, he cannot be held to bail a second time without a Judge's order. (*R. II. 2 W. 4, r. 7. See ante, Vol. 1, 75*).

(b) *Stokes v. Woodeson*, 7 T. R. 6.

(c) *Brault v. Peacock*, 3 D. & R. 2, 1 B. & C. 649, S. C. See form of entry on roll, Chit. Forms, 710.

(d) *Belchier v. Grousell*, 4 Bur. 2502.

(e) *Ohnius v. Delany*, 2 Str. 1216.

(f) *Molling v. Buckholtz*, 3 M. & Sel. 153; MS. T. 1814.

(g) *Bishop v. Powell*, 6 T. R. 616; *Anon.* 1 Dowl. P. C. 59; *Id.* 57; *Vol. 1, 76*.



## CHAPTER XX.

## CASSETUR BREVE.

WHEN the defendant pleads sufficient matter in *abatement*, and the plaintiff cannot deny it, the latter may either obtain leave to amend his declaration, if that will answer his purpose (a), and which will be granted upon payment of costs (b). If the writ be wrong also, the plaintiff must, if the Court or a Judge will allow it, get the writ amended also; (as to which, see *Vol. 1, 111, post*); or he may at once enter on the roll a judgment that the writ be quashed, in order that he may be enabled to commence a new action. If he adopt the latter mode, let him *get a roll of the day and term the declaration is delivered, and enter the declaration and plea on it, as in ordinary cases, and lastly the cassetur (c)*. Docket it with the clerk of the judgments, as in ordinary cases, and get it marked by him; pay him 4d. per sheet; after which, take the roll to the clerk of the treasury, who will file the same in the treasury of the Court. Leave of the Court is not necessary in order to make this entry; nor is the plaintiff obliged to pay costs (d).

As to quashing a writ of error, see *Vol. 1, 332*.

(a) It will not, if the writ be wrong also, and if that cannot be amended.

(b) *Mestair v. Hertz*, 3 M. & Sel. 450.

(c) See the form, *Chit. Forms*, 711.

(d) *Pr. Reg.* 6; *ante*, 473. Formerly, after entering a *cassetur billa*, the plaintiff might deliver another declaration by the bye for the same cause of

action, at any time within the term in which the writ was returnable; (*Miller v. Andrew*, 5 T. R. 634); but if that time had elapsed, he must have sued out new process, if he wished to recommence his action. The practice of declaring by the bye is, it seems, now abolished. See *Vol. 1, 188*.

## CHAPTER XXI.

## PUTTING OFF THE TRIAL.

*In what cases.*] If there be any *bond fide* and unavoidable reason or fact properly shewn, on affidavit, why it is unsafe to proceed to trial, the Court will in general put off the same. Thus the Court will in general, when a material witness for either party is absent, allow the trial to be put off, either to another day of the same sittings, or to another sitting in the same term, or to another term, or even for a longer period under particular circumstances (*a*): to another day of the same sittings or assizes, at the instance of either party; to another sittings, term, or assizes, at the instance of the defendant only, for a plaintiff may have all the effect of such an application by withdrawing his record (*b*). They have put off a trial until a commission should go to examine a material witness abroad who refused to attend, and until the deposition should be certified (*c*). They have refused it, however, in another case, where it did not appear that there was any likelihood of the witness's return (*d*); and the same, where the witness did not go abroad until after notice of trial was given, and he might consequently have been served with a *subpoena* in sufficient time (*e*); and they will also, it seems, in general refuse it, if the party applying have conducted himself unfairly, or have been the cause of any improper delay (*f*). They have also refused it, upon the application of the plaintiff, in a penal action (*g*); and in another case, where the evidence of the absent witness was intended to sustain a defence not favoured by the Court (*h*). In an action for libel, where a justification was pleaded, the Court, upon the application of the defendant, put off the trial, to enable him to procure the attendance of witnesses from abroad, (the nature of the evidence being particularly pointed out in the affidavit), but imposed the terms of his admitting upon the trial the publication of the alleged libel (*i*). Even where the Court had twice before put off the trial, on account of the absence of a material witness on a whaling voyage; and the defendant applied a third time to put off the trial, on account of the witness being still absent: the Court granted the

(a) See *Stratford v. Marshall*, Barnes, 440.

(b) MS. H. 1826, *cor.* Abbott, C. J. See *Curtis v. Barker*, 2 C. & P. 185; *Ansley v. Birch*, 3 Camp. 333; 2 Taunt. 221.

(c) *Rex v. Williams*, 1 W. Bl. 512, cited.

(d) *Rex v. D'Em*, 1 W. Bl. 515.

(e) *Bourne v. Church*, Barnes, 442; and see *Postan v. Rose*, 4 C. & P. 271.

(f) *Saunders v. Pittman*, 1 B. & P. 33; *Taylor v. Gilkes*, 1 Chit. Rep. 730; *Wade v. Birmingham*, 2 Chit. Rep. 5, 1 M. & R. 111, (a), S. C.

(g) *Tidd*, 771, n.

(h) *Robinson v. Smyth*, 1 B. & P. 454.

(i) *Brown v. Murray*, 4 D. & R. 830; and see *McCauley v. Thorpe*, 1 Chit. Rep. 685.

application, upon the terms of the defendant's bringing the money into Court, or giving security for it to the satisfaction of the master (*k*). So, where the copy of a judicial document in the West Indies was stated to be material and necessary evidence for the defendant, the Court put off the trial to give time to procure it (*l*).

There are also other grounds, upon which the Court will put off a trial, besides that above mentioned of the absence of a material witness. Where the defendant's attorney was so ill that he could not attend, the Court upon application put off the trial (*m*). So, where a libel was published immediately before the assizes, with an intent to influence the jury, the Court upon application put off the trial (*n*). Also, where three actions were brought against three several defendants, for different parts they had taken in the same transaction, in one of which issue was joined on a demurrer, and issues in fact in the other two; the Court, upon application of the defendants, put off the trials of the issues in fact, until the demurrer should first be argued, as the point of law involved in it was the foundation of the plaintiff's right to damages in the other two actions (*o*). They have, however, refused to put off a trial, until a suit concerning the same matter in the ecclesiastical court should be determined (*p*). So, they have refused to put off the trial of a cause brought by the assignees of a bankrupt, because a petition is pending against the commission of bankruptcy (*q*). They have refused it also, where the application was made merely because counsel were not prepared (*r*). And a Judge at *nisi prius* has refused to put off a trial, to give the plaintiff an opportunity to amend his declaration, by omitting the profert (*s*). Also, where the defendant was arrested as he was coming to court to attend his cause, the Judge at *nisi prius* refused to put off the trial on that account, unless upon payment of costs (*t*).

And lastly, the Court or a Judge at *nisi prius* will put off the trial of an issue out of Chancery, for the same reasons and under the same circumstances as in ordinary actions (*u*).

*Application.*] The application, in term time, should be made to the Court for a rule *nisi*; in vacation, to a Judge at chambers; and should, it seems, be made at least two days before the day of trial (*w*). Or, if the grounds of the application have occurred or become known to the party so recently, that he cannot make it in the manner now mentioned, he may apply to the Judge at *nisi prius* just before or

(*k*) MS. E. 1820.

(*l*) *Mackenzie v. Hudson*, 1 D. & R. 159.

(*m*) *Hayley v. Grant*, Sayer, 63; *Willis v. Farrer*, 3 Y. & J. 381.

(*n*) *Ree v. Gray*, 1 Bur. 510. See *Coster v. Merrett*, 7 Moore, 87, 3 B. & B. 272, S. C.

(*o*) *Burdett v. Colman*, 13 East, 27.

(*p*) *Anon.* 2 Salk. 649; *Salisbury v. Pactor*, Id. 646.

(*q*) *Assignees of — v. —*, 2 Chit.

Rep. 411.

(*r*) *Colebrook v. Dobbs*, 3 Bur. 1319.

(*s*) *Paine v. Bustin*, 1 Stark. 74.

(*t*) *Solomon v. Underhill*, 1 Camp. 229.

(*u*) *Buxton v. Lawton*, 4 Camp. 163.

(*w*) See *Roberts v. Dunces*, Barnes, 437; *Roberts v. Hillsborough*, Id. 438; *Bourne v. Church*, Id. 442; *Sellon v. Chamberlayne*, Id. 444; *Anon.* 3 Taunt. 315.

even after the cause has been called on, who will accordingly put off the trial, if satisfied as to the sufficiency of the grounds stated for the application. (*See R. H. 14 G. 2; Vol. 1, 272, 273*) (*x*). It may be necessary to add, that a Judge sitting at *nisi prius* at Westminster, cannot make an order in a cause to be tried in London (*y*).

If the application be made at *nisi prius*, notice of the intended application, and a copy of the affidavit on which it is founded, must previously be given to the opposite party; which may have the effect of preventing his incurring the expense of bringing up his witnesses, if he do not intend to oppose the application; or if he do oppose it, it affords him an opportunity of shewing cause against it in the first instance (*z*). The affidavit should, before service of the copy, be drawn up at the clerk of the rules. The counsel's fees for moving is usually one guinea for a rule *nisi*, and the same or more for moving to make it absolute.

The application must be founded on an affidavit stating the grounds upon which it is made. If made on account of the absence of a material witness, the affidavit in ordinary cases states the time issue was joined, the time for which notice of trial was given, the absence of the witness, and that the party cannot safely proceed to trial without him, the endeavours which have been made to find him, and the time at which he is expected to return (*a*). But if the witness be abroad, or if, from the nature of the application, it may be suspected that it is made merely for the purpose of delay, the above general form will not in general be sufficient, but the Court usually require that the affidavit shall state the cause of action, and the evidence expected from the witness, in order that they may judge if it be material, and that it also state circumstances from which they may infer the probability of the witness's return within a reasonable time (*b*). It is in general best that the affidavit should state (if possible) when the witness is expected to return (*c*). In no case, however, is it necessary to state the name of the witness, on account of whose absence the party cannot proceed to trial (*d*). Formerly, it seems, this affidavit must have been made by the party himself (*e*); but the affidavit of the attorney in the cause has since been deemed sufficient (*f*), and even the affidavit of the attorney's clerk, if it state that he is particularly acquainted with the circumstances of the cause, and has the management of it (*g*).

In deciding upon an application of this kind, the Court will not in general enter into any inquiry as to the admissibility of the evidence required (*h*).

(*x*) *Ausley v. Birch*, 3 Camp. 333; 436.  
*Abon*, 3 Taunt. 315.

(*y*) *Atkinson v. Dickinson*, 3 Camp. 41.

(*z*) See form of notice, Chit. Forms, 712; and of affidavit, *Id*.

(*a*) See the form, Chit. Forms, 712.

(*b*) See *Rex v. D'Eon*, 3 Bur. 1513, 1 W. Bl. 510, S. C.; *Lord v. Cooke*, *Id*.

(*c*) 1 Chit. Rep. 730 *a*.

(*d*) *Smith v. Dobson*, 2 D. & R. 420; *Buckingham v. Banks*, 4 D. & R. 832, n.

(*e*) *Carter v. Uppington*, Barnes, 437.

(*f*) *Duberly v. Gunning*, Peake, 97.

(*g*) *Sullivan v. McGill*, 1 H. Bl. 637.

(*h*) See *Mackenzie v. Hudson*, 1 D. & R. 159.

*Costs.*] When the trial is thus put off, it is usually upon the terms of paying any costs the opposite party may have thereby been put to; and when the plaintiff sued as a pauper, and the defendant had the trial put off, upon undertaking to pay the costs of the day, the Court of Common Pleas granted an attachment against the defendant for the non-payment of these costs (*i*). The order for putting off the trial, when made at *nisi prius*, ought to be drawn up on the terms of the party who obtains it *undertaking* to pay the costs of the day, otherwise there might be some doubt whether an attachment could be granted for not paying them. But, at all events, if drawn up generally on payment of costs, such payment being a condition precedent, if they be not paid you may proceed to try the cause. The party gets these costs taxed upon the rule or order in the usual way. (*See post*, 804).

(i) *Rice v. Brown*, 1 B. & P. 39.

## CHAPTER XXII.

## TRIAL BY PROVISIO.

*In what cases.*] IN all cases where the plaintiff, after issue joined, does not proceed to trial, where by the course and practice of the court he might have done so, the defendant may, if he wish, have the action tried by proviso; that is, he may give the plaintiff notice of trial, make up the *nisi prius* record, carry it down and enter it with the marshal, and proceed to the trial as in ordinary cases. This, however, can be done only in cases where the plaintiff has been guilty of some laches or default after issue joined; except in replevin, prohibition, *quare impedit* (a), and error in fact (b), in which cases both parties being actors, the defendant may make up the *nisi prius* record, and thereupon proceed to trial, although no laches or default be imputable to the plaintiff. The Court have also allowed a defendant to carry down the record of an issue, directed by the Court of Chancery, to trial by proviso, upon it being suggested to them that the plaintiff wished to delay the cause (c). Where, upon a special jury cause being called on for trial, there was not a full special jury, and neither party prayed a *tales*, the defendant cannot afterwards take down the record by proviso (d).

As the delay and expense attending the trial by proviso, however, are material objections to this mode of proceeding, it is seldom adopted, unless in cases where the defendant is particularly anxious that the cause should be finally settled by verdict, and in some other cases particularly specified in the next chapter; in other cases, the defendant usually moves for judgment as in case of a nonsuit, in preference to proceeding to trial by proviso.

*When and how.*] A trial by proviso cannot be obtained in the same term in which the plaintiff's default was made. (*R. II. 2 W. 4, r. 71*).

After the issue has been joined, if the plaintiff, in causes in London or Middlesex, make default in trying it, or, in country causes, do not proceed to trial at the next assizes, the defendant may afterwards proceed to trial by proviso. (*R. M. 4 A. c*). Formerly, it was necessary, except in replevin, prohibition, *quare impedit* (e), or error in fact (f), for the defendant to have obtained a rule, on the back of the issue,

(a) *Reg. v. Banks*, 2 Salk. 652, 2 Ld. Raym. 1082, S. C.; and see *Smith v. Blundell*, 1 Chit. Rep. 226; *Worcestershire Canal Company v. Trent Navigation Company*, 1 Marsh. 218.

(b) 2 Saund. 336 a.

(c) *Humpage v. Rowley*, 4 T. R. 767.

(d) *Phillips v. Dance*, 9 B. & C. 769.

(e) *Reg. v. Banks*, 2 Salk. 652.

(f) 2 Saund. 335.

from the master, for this trial by proviso; but now such rule is not necessary in any case. (*R. H. 2 W. 4, r. 71*) (*g*). Formerly, also, the defendant, before he could proceed to trial by proviso, must have ruled the plaintiff to enter the issue; and such entry was necessary before the defendant could have moved for such trial; but now such entry is no longer requisite for this purpose. (*R. H. 2 W. 4, r. 70*).

The defendant must give the plaintiff the same notice of trial, that the plaintiff is obliged to give him in ordinary cases; (*see Vol. 1, 223*); except that it is not necessary to give a term's notice, where no proceedings have been had in the cause for four terms, as is the case when the plaintiff takes down the record to trial (*h*).

The jury process is the same as in ordinary cases; excepting that in the *distringas*, after the words "many defaults," you insert this clause: "*Provided always, that if two writs shall come to you thereupon, then you execute and return one of them only, and have there,*" &c. (*i*).

If both the plaintiff and the defendant happen to carry down the record at the same time, the trial shall be by the plaintiff's record, if he enter it with the marshal; but if he omit to do so, the defendant may proceed upon the record brought down by him. (*R. M. 4 A. c.*) (*j*). But although the plaintiff have entered his record with the marshal, yet if he have not given a sufficient notice of trial, his entry will be of no effect; the defendant, in that case, may proceed to trial upon the record he has taken down, and if the plaintiff do not appear to it, he must be nonsuit (*k*). And in all cases where the defendant proceeds upon his record, if the issue happen to be on the plaintiff, who is therefore to begin first, but does not appear, the defendant must not enter upon his proof and take a verdict; but the proper course is to call the plaintiff and nonsuit him (*l*). If, however, instead of doing so, he take a verdict, the Court will not in general set it aside, except for the purpose of allowing a nonsuit to be entered instead of it (*m*).

(*g*) *Dodson v. Taylor*, 2 Str. 1055;  
*King v. Pippett*, 1 T. R. 695.

(*h*) *Theobald v. Crickmore*, 2 B. & Ald. 594, 1 Chit. Rep. 317, S. C. See form of notice of trial, Chit. Forms, 713.

(*i*) See Chit. Forms, 713.

(*j*) *Williams v. Jones*, Barnes, 295.

(*k*) *Brown v. Ottley*, 1 B. & Ald. 253.

(*l*) *Gardener v. Davis*, 1 Wils. 300;  
*Hicks v. Young*, Barnes, 458; 2 Saund. 336 *b*.

(*m*) *Hodgson v. Forster*, 1 B. & C. 110,  
2 D. & R. 221, S. C.

## CHAPTER XXIII.

## COSTS FOR NOT PROCEEDING TO TRIAL.

*In what cases.*] If the plaintiff give notice of trial, and neither countermand his notice (a), nor proceed to trial in pursuance of it, the defendant, upon affidavit of attendance and necessary expenses, shall be entitled to his costs, to be taxed by the master; (*R. M.* 1654, s. 18; and see *R. M.* 4 A. c) (b); even although he have prevented the plaintiff from entering his cause for trial, by entering a *ne recipiatur* with the marshal (c). In like manner, the plaintiff is entitled to costs, if the defendant do not proceed to a trial by proviso, after giving notice to that effect (d); and if both parties give notice of trial, and neither of them countermand their notice, or proceed to trial in pursuance of it, each of them is entitled to costs from the other (e). Also, if the plaintiff do not proceed to execute his writ of inquiry in pursuance of his notice, or countermand it in time, the defendant will be entitled to his costs, in the same manner as for not proceeding to trial. (*Ante*, 517) (f).

The defendant may move for costs for not proceeding to trial, and judgment as in case of a nonsuit, in the same term, but not at the same time. (*R. H.* 2 W. 4, r. 69) (g). And after moving for costs for not proceeding to trial, the defendant cannot move for judgment as in case of a nonsuit. (*R. H.* 2 W. 4, r. 69). The motion may be made without moving at all for judgment as in case of a nonsuit or after such motion is disposed of; and the Court, on discharging a rule for judgment as in case of a nonsuit, may sometimes, as a separate part of the order, order the plaintiff to pay the costs of not proceeding to trial, though indeed the payment of such costs cannot be made a condition of discharging the rule (*Id.*) (h).

A pauper may be liable to costs for not proceeding to trial, though not dispaupered. (*See ante*, 698).

*How obtained, &c.*] Let the defendant's attorney make an affidavit, stating when the action was commenced, issue joined, and notice of trial given, and that the plaintiff did not proceed to trial or

(a) *Whitlock v. Humphreys*, 2 Str. 849.

(b) *Rex v. Mayor of Great Yarmouth*, 5 B. & Ald. 531.

(c) *Pr. Reg.* 406.

(d) *Wilkinson v. Poole*, 2 Str. 797.

(e) *Pr. Reg.* 405. See *Clarke v. Simpson*, 4 Taunt. 591.

(f) *Shadford v. Houstoun*, 1 Str. 317;

*Sutton v. Bryan*, 2 Str. 728.

(g) *Thomas v. Williams*, 4 B. & C.

260, 6 D. & R. 217, S. C.; *Joliffe v.*

*Morris*, 1 B. & P. 38; 1 Sellon, 372;

*Lang v. Webber*, 1 Price, 375; *Mimham*

*v. Langhorn*, 7 Taunt. 476, 1 Moore,

251, S. C.

(h) *Piercy v. Owen*, 1 Dowl. P. C.

362.



countermand the notice (i). Among fair practitioners, a notice of this motion is usually given, and the master will allow for it in costs; if given, the affidavit should state the service. Give this affidavit, with a motion paper, to counsel, "to move for costs for not proceeding to trial in pursuance of notice," and this Court will thereupon grant a rule absolute in the first instance (k). Draw up a rule with the clerk of the rules (l); and get an appointment on it from the master. Serve a copy of the rule and appointment on the plaintiff's attorney; and afterwards attend before the master, and have the costs taxed (m). Then let the defendant or his attorney serve a copy of the rule and allocation on the plaintiff himself personally, and demand the costs; and if not paid, let the defendant and his attorney make an affidavit of the demand and refusal (n), and move thereon for an attachment. This rule for the attachment is absolute in the first instance. Draw it up with the clerk of the rules, and take it to one of the clerks in the Crown Office, who will thereupon make out the attachment; pay him 13s. 6d. Take the writ to the sheriff's office, and obtain a warrant thereon; pay 2s. 6d.; and give the warrant to your officer to execute; the usual fee is one guinea. Under circumstances, the Court may make it part of the rule, that the payment of the costs for not proceeding to trial shall be a condition precedent to ulterior proceeding; but this is not the ordinary practice, and if not so expressed in the rule, the plaintiff may proceed without paying the costs, and the defendant's only remedy for them is by attachment (o). As to the mode of obtaining costs against the lessor of the plaintiff in ejectment, see *ante*, 550.

By *R. M.* 1654, s. 18, above mentioned, the defendant is entitled to costs if the plaintiff do not proceed to trial in pursuance of his notice, unless the plaintiff have countermanded his notice, or "shew cause to be allowed in the Court in excuse of such costs." And the Court of Common Pleas refused the rule, where the plaintiff was prevented from going to trial by an accident which happened to a material witness (p). As the rule, however, is absolute in the first instance, the only way of bringing the matter of excuse under the consideration of the Court, is by moving to discharge the rule.

(i) See the form, Chit. Forms, 714.

(k) In the Exchequer it seems to be a rule nisi only.

(l) See the form, Chit. Forms, 714.

(m) See *Mitchinson v. Allcock*, 1 D. & R. 165.

(n) See the form, Chit. Forms; and see *Rex v. Smithies*, 3 T. R. 351; *Wadham v. Brett*, 2 Wils. 227.

(o) *Wilson v. Curtis*, 8 Bingh. 374.

(p) *Ogle v. Maffatt*, Barnes, 133.

## CHAPTER XXIV.

## JUDGMENT AS IN CASE OF A NONSUIT.

*In what cases.*] WHERE issue is joined, and the plaintiff shall neglect to bring such issue to trial, according to the course and practice of the court, then, upon motion in open court, (due notice being first given thereof), the Judges shall give the same judgment for the defendant as in cases of nonsuit; unless upon just cause and reasonable terms they shall allow a further time for the trial of such issue; and if the plaintiff neglect to try the issue within the time so allowed, the Court shall give such judgment as aforesaid. (14 G. 2, c. 17, s. 1). This statute does not extend to replevin (a), nor, it should seem, to prohibition, *quare impedit* (b), or error in fact; for in all these cases, the defendant may himself take down the record without a proviso. (*Ante*, 801). Nor does it extend of course to any case where the plaintiff could not be nonsuit, if he had proceeded to trial (c). Though formerly doubtful, it is now settled that one of several defendants may obtain a rule for judgment as in case of a nonsuit, which will authorize a general judgment to be entered against plaintiff (d). Where there are several issues in law and in fact, and the defendant have judgment on the issues in law, if the plaintiff do not proceed on the issues in fact, the defendant shall have judgment as in case of a nonsuit; for the plaintiff in such a case might have been nonsuit had he proceeded to trial (e). The statute extends to *qui tam* actions (f); and to actions by executors or administrators (g).

In all cases within the statute, if the plaintiff once comply with it, by taking down the issue for trial, although he be nonsuit, and the nonsuit be afterwards set aside (h), or although he have a verdict, and a new trial be afterwards granted (i), the defendant can never afterwards have judgment as in case of a nonsuit, for any subsequent laches upon the part of the plaintiff in not bringing the cause to trial; but if he wish to dispose of the action, he must take it down for trial by proviso. So, in a country cause, if the cause be made a *remanet* (k), or in a town cause, if it be made a *remanet*

(a) *Jones v. Concannon*, 3 T. R. 661; *Shortridge v. Hiern*, 5 Id. 400.

(b) *Wyndowe v. Bishop Carlisle*, 11 Moore, 249, 3 Bingh. 404, S. C.

(c) *Weller v. Goyton*, 1 Bur. 358. See Vol. 1, 300, 301.

(d) *Jones v. Gibson*, 5 B. & C. 768, 8 D. & R. 592, S. C.; and see *Murphy v. Donlaw*, 5 B. & C. 178, 7 D. & R. 619, S. C.; *ante*, Vol. 1, 301.

(e) *Paxton v. Popham*, 10 East, 360.

(f) *Stone v. Farey*, 1 East 554; *Watson v. Jackson*, 1 Wils. 325.

(g) *Howard v. Ratborne*, Willes, 316; *Barnes*, 130, S. C.; *Herbert v. Kaul*, 4 D. & R. 834.

(h) *King v. Pippett*, 1 T. R. 492; *Doos d. Gyles v. Wynne*, 1 Chit. Rep. 310. See *Henkin v. Gerss*, 2 Camp. 408.

(i) *Porzelius v. Maddocks*, 1 H. 341, 101.

(k) *Brown v. Rudd*, 1 Dowl. P. C. 371; *Mewburn v. Langley*, 3 T. R. 1; *Denmun v. Bull*, 11 Moore, 443, 3 Bingh. 499, S. C.

at the request of the defendant (*l*), the defendant shall not afterwards have judgment as in case of a nonsuit. But otherwise, in a town cause, where the cause is made a *remanet* from one sittings to another, by consent (*m*); for there is a great difference between causes entered for trial in London or Middlesex, and at the assizes in other counties; in the former, the record is not re-entered, nor is any fresh notice of trial given, and the cause comes on as if the sittings had been continued without interruption. So, if a town cause be made a *remanet* from the sittings after one term to the sittings after another term, and the plaintiff then make default, the defendant may have judgment as in case of a nonsuit (*n*). And giving notice that a cause will be taken as an undefended cause at the sittings in London, and appearing for the purpose of trying the cause as undefended, will not prevent the defendant from having such a judgment (*o*). And where the cause is not made a *remanet*, but the plaintiff, instead of allowing it to be tried, withdraws the record, the defendant may have judgment as in case of a nonsuit (*p*). But when the cause is delayed by the general course of business, the defendant cannot have this judgment; and where, in a special jury cause, upon being called on for trial, there was not a full special jury, and neither party prayed a tales, it was considered that the defendant could neither have a judgment as in case of a nonsuit, nor take down the record by proviso (*q*). And where a special jury cause had been set down for trial, and stood in the paper so long as three years, the defendant was refused a judgment as in case of a nonsuit, he not having made any application to have a day appointed for the trial (*r*). If the cause be abated by the death of one of the plaintiffs or otherwise, the defendant cannot afterwards have a judgment as in case of a nonsuit (*s*).

*When and how obtained.*] The defendant is not entitled to judgment as in case of a nonsuit, by the above statute, until the plaintiff have failed to bring on the cause to trial within the time allowed him for that purpose by the practice of the court. By the practice of this court, the plaintiff is in no case obliged to give notice of trial until the term after that in or of which issue is joined; (*Vol. 1, 225*) (*t*); and consequently no motion can be made for judgment as in case of a nonsuit, until the third term inclusive after issue joined, unless the plaintiff have in fact given notice of trial previously, and not proceeded to trial in pursuance of such notice (*u*). Where the plaintiff gives notice of trial sooner than he need, he is still bound to proceed to trial

(*l*) MS. E. 1820.

(*m*) *Gadd v. Bennett*, 2 B. & Ald. 709.

(*n*) *Ham v. Greg*, 6 B. & C. 125, 9 D. & R. 125, S. C.

(*o*) *Edrupp v. Davies*, 1 Dowl. P. C. 352.

(*p*) *Burton v. Harrison*, 1 East, 346.

(*q*) *Phillips v. Duncie*, 9 B. & C. 769.

(*r*) *Rucker v. Anselvy*, 2 Chit. Rep. 243.

(*s*) *Cecchi v. Powell*, 6 B. & C. 253, 9 D. & R. 243, S. C.

(*t*) 2 T. R. 734; and see R. H. 15 & 16 C. 2, r. 2; R. H. 20 & 21 C. 2.

(*u*) *Munt v. Tremamondo*, 4 T. R. 557; *Gates v. Terry*, E. T. May 3, 1832, K. B., 1 Dowl. P. C. 370, S. C.; *Hay v. Howell*, 2 New Rep. 397; *Walter v. Buckle*, 2 Chit. Rep. 244; *Holah v. Fleet*, 1 Chit. Rep. 672.

pursuant to the notice, or the defendant may move for judgment as in case of a nonsuit in the following term (x). Where a default in not proceeding to trial has been made by the plaintiff, but the defendant does not move for judgment as in case of a nonsuit until after fresh notice of trial, the motion is still made in time to entitle him to judgment (y). When a town cause has been made a *remanet* from the sittings after Easter term to the sittings after Trinity term, and the plaintiff has then made default, the defendant may move for judgment as in case of a nonsuit in the Michaelmas term following (z).

In country causes, if the issue be joined in an issuable term, and no notice of trial given for the next assizes, the defendant cannot move for judgment as in case of a nonsuit, until after the plaintiff has failed to bring down the cause for trial at the second assizes (a). In country causes, in an issuable term, the rule should be moved for early in the term, or the Court will perhaps enlarge it till next term, and not permit it to be discussed at chambers (b).

By rule of *H. T. 2 W. 4, r. 69*, the motion for judgment as in case of a nonsuit cannot be made after a motion for costs for not proceeding to trial pursuant to notice. But this rule does not prevent the motion for such a judgment after a motion for costs of the day, where the plaintiff has afterwards made default in not giving notice of trial (c).

In order to obtain judgment as in case of a nonsuit, you must make an affidavit of the state of the cause, and the plaintiff's default (d). An affidavit merely stating that a rule to reply was duly given, that the plaintiff accordingly replied, and that the cause was "thereby" at issue, is not sufficient (e). If the motion be made in the next term after issue is joined, the affidavit must state that notice of trial was given, and that the plaintiff had not proceeded to trial in pursuance of his notice. Give a motion paper with this affidavit to counsel, to move for a rule nisi, and mark the number of the roll upon it; and before the motion is made, you must get the clerk of the treasury to bring the roll into court; or if you are at Westminster before the sitting of the court, the clerk of the papers will mark the roll in the treasury "Read" (f). Draw up your rule with the clerk of the rules (g); pay 6s.; serve a copy of it on the plaintiff's attorney or agent, and make an affidavit of the service. And afterwards, on the day after that appointed by the rule, give a motion paper to counsel, to move to make the rule absolute upon this affidavit of service. It is in gene-

(x) *Howlett v. Powlett*, 1 M. & Scott, 355, 8 Bingh. 272, 1 Dowl. P. C. 263, S. C.

(y) *Bainbridge v. Purvis*, 1 Dowl. P. C. 444.

(z) *Ham v. Greg*, 6 B. & C. 125, 9 D. & R. 125, S. C.; *ante*, 806.

(a) *Miller v. Hassall*, MS. T. T. 1828; *Simonds v. Folkenham*, 1 Dowl. P. C. 292, 1 C. & J. 513, 1 Tyr. 501, S. C.; *Redward v. Way*, 13 Price, 453; *Crowley v. Doan*, 1 C. & J. 18; *Spiera v.*

*Parker*, Id. n.; *Prentice v. Blott*, 2 Bingh. 360.

(b) *Tidd*, 502, 765.

(c) *Hyde v. Gardner*, 1 Dowl. P. C. 380; and see *ante*, 803.

(d) See the form, *Chit. Forms*, 715.

(e) *Smith v. Paroloe*, 10 Law Jour. 81, 1 Dowl. P. C. 308, 2 C. & J. 317, S. C.

(f) 1 Sellon, 366.

(g) See the form, *Chit. Forms*, 716.

ral advisable, however, in a country cause not to move to make the rule absolute, until three or four days after the day appointed to shew cause (*h*). The statute requires that notice be given of the motion; but the rule *nisi* may be obtained without previous notice; however, without such previous notice, the rule will not operate as a stay of proceedings, (*R. H. 2 W. 4, r. 68*) (*i*), and in most cases, therefore, it is advisable to give it. The general rule, so often noticed in the course of this work, which requires a term's notice of proceeding, where no proceedings have been had in the cause within four terms, does not it seems extend to motions for judgment as in case of a nonsuit (*k*). An entry of the issue on record is no longer, as it formerly was, necessary to entitle a defendant to move for judgment as in case of a nonsuit. (*R. H. 2 W. 4, r. 70*).

The Court, however, instead of making the rule absolute, may "upon just cause and reasonable terms," allow a further time for the trial of the issue. (*Vide ante*, 805). As to the "reasonable terms" here mentioned, the Court usually discharge the rule upon the plaintiff's undertaking peremptorily to try the cause at the next sittings or assizes, or, if it appear that he cannot (from the peculiar circumstances of the case) bring on the trial at that time, at some subsequent sittings or assizes (*l*); but where the justice of the case requires it, the Court will add to this such other terms as they may think reasonable. Besides the undertaking here mentioned, however, the plaintiff must shew to the Court "just cause" for his not having proceeded to trial, and this must be by affidavit, and the excuse must be such as to satisfy the Court that the plaintiff's not having proceeded to trial arose, not from any wish upon his part to delay the trial of the issue unnecessarily, or for the purpose of vexation, or from any other improper motive, but from necessity, or from some other just cause (*m*). The absence of a material witness, or perhaps want of documentary evidence, is sufficient cause (*n*); and where the plaintiff in a *qui tam* action withdrew the record, because his principal witness refused to give evidence for fear of subjecting himself to a penalty for the same transaction, the Court allowed it to be a sufficient excuse; although it appeared that the time limited for bringing any action against the witness would not expire for three terms, and that the plaintiff could not proceed to trial until after the expiration of that time (*o*). So, the insolvency of the defendant after action brought (*p*) is deemed a sufficient excuse; and the Court usually in such a case give the de-

(*h*) Chit. Sum. Prac. 108, 166.

(*i*) See Lofft, 265. See the form, Chit. Forms, 715.

(*k*) *Doe d. Phillips v. Moses*, 5 T. R. 634; *Manby v. Wortley*, 2 W. Bl. 1223; *Hockin v. Reeve*, 2 Y. & J. 275; *ante*, Vol. 1, 212, 222.

(*l*) See *Hacher v. Hardy*, 1 Chit. Rep. 280, n.; *Raynes v. Spicer*, 7 T. R. 178; *Gardner v. Moses*, 1 Taunt. 118.

(*m*) See *Walter v. Buckle*, 2 Chit.

Rep. 244; but see *Stone v. Farey*, 1 East, 554.

(*n*) See *Jones v. Stephenson*, Barnes, 316; *Jordan v. Martin*, 8 Taunt. 104; *Bunyan v. Yerbury*, 1 D. & R. 448; *Greenhill v. Mitchel*, 6 Taunt. 150.

(*o*) *Raynes v. Spicer*, 7 T. R. 178; *sed vide Bunyan v. Yerbury*, 1 D. & R. 448.

(*p*) *Bailey v. Wilkinson*, 2 Doug. 671; MS. E. 1820.

defendant his option of a *stet processus*, (if the plaintiff be willing to give it), or to have his rule discharged (q). The Court have even allowed it to be a sufficient excuse, that the attorney was not enabled to prepare briefs for counsel, on account of the plaintiff's absence (r). The Court are in general more strict in this respect, where notice of trial has been given, than in other cases. If a rule *nisi* for judgment as in case of a nonsuit be discharged on an affidavit of an excuse which is false in fact, the Court will not afterwards open the matter upon disproof of the contents of such affidavit; although, had they seen reason to doubt the truth of it at the time of shewing cause, they would have suspended their judgment until the matter were examined into (s). *It is usual for the plaintiff's counsel to shew his affidavit to the counsel for the defendant; and if the latter be satisfied with the excuse stated in the affidavit, he may consent to the rule being discharged, upon the peremptory undertaking above mentioned; the briefs may be indorsed accordingly, and handed to the clerk of the rules (t).*

The rule for judgment as in case of a nonsuit, is either discharged upon the peremptory undertaking above mentioned, or made absolute (t). If made absolute, let the defendant draw up the rule with the clerk of the rules; pay 5s. (u). Then bespeak the roll of the clerk of the treasury, in order that the master may mark the costs; pay him 1s. 6d. and 5s. 10d. more in vacation. Judgment being signed, you may sue out execution (x). The Court, in discharging the rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial, but the payment of such costs cannot be made a condition of discharging the rule. If the rule be made absolute, those costs must be made the subject of a separate motion. (*R. H. 2 W. 4, r. 69*) (y).

If the rule be discharged upon a peremptory undertaking, the plaintiff must proceed to trial accordingly, and of which trial he must give a fresh notice (z). If the plaintiff neglect to proceed to trial in pursuance of such undertaking, let the defendant's attorney make an affidavit of the fact (a), and give this with a motion paper to counsel, to move for judgment as in case of a nonsuit for not proceeding to trial in pursuance of a peremptory undertaking; and the Court will thereupon grant a rule absolute in the first instance (b). Then sign judgment, as above directed, and sue out execution.

If, however, the plaintiff have been prevented by circumstances from proceeding to trial in pursuance of his undertaking, he must,

(q) See the form of entry of *stet processus*, Chit. Forms, 717.

(r) *Stone v. Farey*, 1 East, 554. See *Wynn v. Bellman*, 6 Taunt. 122.

(s) *Davies v. Cottle*, 3 T. R. 405.

(t) See form of rule for discharging it on a peremptory undertaking, Chit. Forms, 716.

(u) See the form, Chit. Forms, 716.

(x) See form of judgment, Chit.

Forms, 718.

(y) *Johnson v. Smith*, 1 Dowl. P. C. 421. See *Piercy v. Owen*, 1 Dowl. P. C. 362; *Lenniker v. Barr*, Id. 563, 2 C. & J. 473, S. C.

(z) *Sulsh v. Cranbrook*, 1 Dowl. P. C. 148; *Bainbridge v. Purvis*, Id. 444.

(a) See the form, Chit. Forms, 717.

(b) See *Battie v. Brown*, Say. 74; *Milton v. Terrill*, Barnes, 315.

before the defendant has moved for judgment as above mentioned, make an application to the Court, "to discharge the peremptory undertaking given in this cause," upon an affidavit of the facts; upon which, if sufficient, the Court will grant a rule *nisi* accordingly. And the absence of all but one of a special jury, in a cause which ought apparently to be tried by a special jury, has been deemed a good excuse for not proceeding to trial in pursuance of a peremptory undertaking (c). So perhaps would any other delay arising from the general course of business (d). Also, where a plaintiff, under a peremptory undertaking to try, set down his cause for trial at a certain sittings (there being no prospect of its being tried at those sittings), his not having carried in the record to the marshal's office was not deemed sufficient to entitle the defendant to judgment as in case of a nonsuit (e):

(c) *Master v. Milner*, 1 Bingham 70, 7 Moore, 367, S. C.; see *Phillips v. Dance*, 9 B. & C. 769.

(d) *Phillips v. Dance*, 9 B. & C. 769.  
(e) *Cope v. Holt*, 1 D. & R. 180.

## CHAPTER XXV.

## NOLLE PROSEQUI AND RETRAXIT.

A *NOLLE PROSEQUI* is a partial forbearance by the plaintiff to proceed any further, either in the suit altogether, or as to some part of it, or as to some of the defendants; but if entered as to part of the suit only, or as to some of the defendants, he is at liberty to proceed as to the rest (*a*). If the *nolle prosequi* be entered ~~before judgment~~, the plaintiff may afterwards commence another action for the same cause; but if entered *after judgment*, it operates as a *retraxit*, and bars any future action for the same cause (*b*). A *nolle prosequi* is different from a *nonpross*, for there the plaintiff is put out of court with respect to all the defendants (*c*).

*To the whole declaration.*] If the plaintiff misconceive his action, or make a mistake as to the party sued, (as where he sues a feme covert, and she pleads coverture in bar (*d*), or where he discovers that the defendant is an infant, and the action is not for necessities, or the like), he may enter a *nolle prosequi* as to the whole cause of action (*e*), and proceed *de novo* in another action.

*To some of several counts.*] Where the defendant pleads one plea to the whole declaration, and that plea happens to be a complete bar to one or more of the counts, but not to others, the plaintiff may enter a *nolle prosequi* as to the counts to which the plea is a bar. Thus, where assumpsit is brought for goods sold, &c. and upon an account stated, and infancy is pleaded to the whole of the declaration, the plaintiff may enter a *nolle prosequi* as to the count upon an account stated, (no action upon an account stated lying against an infant), and reply to the other counts (*f*). • In a late case, where a declaration in debt consisted of one special and several general counts; and to the special count there were several special pleas, and to the general counts the general issue, the plaintiff having entered a *nolle prosequi* on the special count, and joined issue on the others; it was held, that he was entitled to recover on the general counts, though the matters proved might have been given in evidence on the special count, and the pleas pleaded thereto (*g*).

(a) 1 Saund. 207 b.

(b) *Cooper v. Tiffin*, 3 T. R. 511;  
*Bowden v. Horne*, 7 Bingh. 716.

(c) *Philpot v. Moller*, 1 Doug. 169, n.,  
561.

(d) *Cooper v. Tiffin*, 3 T. R. 511.

(e) See the form of the entry, Chit.  
Forms, 719.

(f) 1 Saund. 207 b.

(g) *Hayward v. Kain*, 1 M. & M.  
311.



But where there is a *demurrer* to a whole declaration, the plaintiff will not in general be allowed to rectify his error, by entering a *nolle prosequi* as to some of the counts (*h*): thus, where there was a demurrer to a declaration against two defendants, because one of them was not named in one of the counts, the Court held that the plaintiff could not enter a *nolle prosequi* as to that count, and proceed on the others (*i*). So, where there was a demurrer to a declaration for a misjoinder of counts, the Court held that the plaintiff could not rectify his mistake by entering a *nolle prosequi* as to some of the counts (*k*). But if the defendant demur or plead separately to several counts, the plaintiff may enter a *nolle prosequi* as to some of the counts, and proceed to trial or argument on the others (*l*). If the defendant plead to one count and demur to another, the plaintiff, if he have judgment on the demurrer, and be content to take damages upon that judgment only, may execute a writ of inquiry as to it, or, in case of a bill of exchange or the like, may have it referred to the master, and may enter a *nolle prosequi* as to the issue in fact. (*Ante*, 481, 522) (*m*).

*To part of a count.*] The plaintiff may enter a *nolle prosequi* as to part of a count. Thus, in trespass, where the plaintiff declares that the defendant took and carried away the plaintiff's hay, grass, and corn, he may enter a *nolle prosequi* as to the hay and grass, and proceed for the taking of the corn (*n*).

*As to some of several defendants.*] In actions upon contracts against several defendants, if the defendants join or sever in their pleas, the plaintiff cannot enter a *nolle prosequi* as to any one of them, without releasing the others (*o*); but if they sever in their pleas, and one of them plead bankruptcy, *ne unques executor*, or any other matter in his personal discharge, although he plead also to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others (*p*).

In actions *ex delicto*, the plaintiff may enter a *nolle prosequi* as to some of the defendants, and proceed against the others, at any time before final judgment, even although they all join in the same plea, and be found jointly guilty (*q*). And *a fortiori*, he may do so, where

(*h*) *Drummond v. Dorant*, 4 T. R. 360; 1 Saund. 207 b.

(*i*) *Drummond v. Dorant*, 4 T. R. 360.

(*k*) *Rose v. Bowler*, 1 H. Bl. 108.

(*l*) 1 Saund. 207 a, 203, 339; 2 Ro. Abr. 101, G. pl. 1; *Fleming v. Langton*, 1 Str. 532; *Duperoy v. Johnson*, 7 T. R. 473; *Dicker v. Adams*, 2 B. & P. 163; 1 B. & P. 157; *Bertram v. Gordon*, 6 Taunt. 444.

(*m*) See form of the entry, Chit.

Forms, 719.

(*n*) 1 Saund. 207 b.

(*o*) *Noke v. Ingham*, 1 Wils. 90; 1 Saund. 207, (*n*).

(*p*) *Noke v. Ingham*, 1 Wils. 89, 1 Doug. 169, n., S. C.; *Hawkins v. Ramsbottom*, 6 Taunt. 179; *Moravia v. Hunter*, 2 M. & Sel. 444.

(*q*) *Coux v. Louthier*, 1 Ld. Raym. 597; *Dale v. Eyre*, 1 Wils. 306; *Parker v. Lawrence*, Hob. 70; *Lover v. Salkeld*, 2 Salk. 455.

the defendants plead severally (*r*); or where they plead jointly, but their plea in its nature is several; as where in ejectment against several, who jointly plead not guilty, the plaintiff may, even at the assizes, enter a *nolle prosequi* as to one or more of the defendants, and proceed against the rest (*s*). Also, if the jury, in an action of trespass, sever the damages, where they should not, the plaintiff may take judgment *de melioribus damnis* against one of the defendants, and enter a *nolle prosequi* as to the other. (*Vol. 1, 309*) (*t*).

*How entered.*] If entered before issue joined, the plaintiff inserts it at the commencement of his replication, &c. and it consequently appears upon the roll when it is made up; but if after issue joined, it is sufficient if it be entered at the time of entering the final judgment (*u*). If the plaintiff inadvertently enter the *nolle prosequi* in an improper way, the Court will, perhaps, on application for that purpose in proper time, relieve him from it (*x*).

*Costs.*] Where a *nolle prosequi* is entered as to the whole declaration, the defendant is and always was entitled to costs, in the same manner as upon a discontinuance (*y*). (*See as to the costs of a discontinuance, ante, 794*). And where entered as to some of several counts, or as to part of a count, the plaintiff was not entitled to costs as to these counts, or parts of counts, although he had a verdict on the rest (*z*). But although the plaintiff was not entitled to such costs, yet he was not liable to pay the defendant his costs occasioned thereby. Now, however, by the 3 & 4 W. 4, c. 42, s. 33, "where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf."

Where a *nolle prosequi* is entered as to one of several defendants, the defendant as to whom it is entered is and always was generally entitled to costs (*a*). But he was not so, if it was entered as to him on a plea of his personal discharge, as of his bankruptcy and certificate (*b*). Now, however, by the 3 & 4 W. 4, c. 42, s. 32, he would be entitled to them; that act enacting, "that where several persons shall be made de-

(*r*) *Walsh v. Bishop*, Cro. Car. 239, Id. 243, S. C.; 2 Ro. Abr. 100, pl. 5; *Groves v. Rolfe*, 2 Salk. 457.

(*s*) *Gree v. Rolfe*, 1 Ld. Raym. 716, 12 Mod. 651, S. C.

(*t*) See form of the entry, Chit. Forms, 720.

(*u*) *Fleming v. Langton*, 1 Str. 532; *Dupercy v. Johnson*, 7 T. R. 473; *Bowden v. Horne*, 7 Bingh. 723. See form of entry of *nolle prosequi* to the whole declaration, Chit. Forms, 719; the like to one or more of several counts, Id.; the like as to some of several defendants, Id. 720.

(*x*) See *Bowden v. Horne*, 7 Bingh. 723.

(*y*) *Cooper v. Tiffin*, 3 T. R. 511.

(*z*) *Hubbard v. Briggs*, 16 East, 129. Where entered as to one or more of several counts, or to a part of a count, on a demurrer thereto, the costs of the demurrer to the abandoned count must be paid; (see *Goddard v. Smith*, 2 Salk. 456); but such costs need not be paid or deducted until the final taxation. (*Bertram v. Gordon*, 2 Marsh. 144; 6 Taunt. 444).

(*a*) *Jackson v. Chambers*, 8 Taunt. 643, 2 Moore, 718, S. C.

(*b*) *Booth v. Middlecoat*, 6 Bingh. 445; *Harewood v. Matthews*, 2 Tidd, 9th ed. 981.

pendants in any *personal* action, 'and any one or more of them shall have a *nolle prosequi* entered as to him or them, *every such person shall have judgment for, and recover, his reasonable costs.*'"

*Retraxit.*] A *retraxit* is very similar to a *nolle prosequi* to the whole declaration; excepting that the former is a bar to any future action for the same cause, the latter is not, unless made *after judgment* (c): the former is also made in person in open court when the trial is called on, the latter is made by a mere entry on the roll out of court.

As a *retraxit* is very unusual in practice, it is unnecessary to consider it further in this place (d).

(c) 1 Saund. 207, n.; *Bowden v. Horne*, 7 Bingh. 716.

(d) See the form of the entry on the roll, 2 Sellon, 338.

## CHAPTER XXVI.

## REMITTITUR DAMNA.

IN ejectment, if the plaintiff have judgment by confession or default, it is usual for him to remit the damages, and to pray the writ of possession merely (a).

In replevin of a distress for "rent, customs, services or damage feasant," where the defendant signs judgment of *nonpross* for want of a plea in bar, (see ante, 589), he usually remits the damages, sooner than be at the expense of a writ of inquiry, and takes his judgment for a return merely (b).

Where the jury give greater damages than the plaintiff has declared for, it may be rectified by entering a *remittitur* for the excess (c); or if the plaintiff have signed judgment for the greater sum, the Court will give him leave to amend it, by entering a *remittitur* for the excess, even in a subsequent term, and after error brought (d). If the plaintiff, however, demand in his declaration more than by his own shewing is due, and there be a special demurrer for this cause, he cannot rectify the mistake by entering a *remittitur* for the surplus (e); but if the declaration be not demurred to, it seems he may (f), unless the sum demanded depend upon some deed or other instrument, where the debt or duty to be recovered appears certain and entire upon the face of it, as in debt or covenant to pay 20*l.*; in which case a demand of more than appears due is bad, and cannot be aided by the entry of a *remittitur* (g). But if the sum to be recovered may be more or less, by matter extrinsic, as in debt or avowry for rent, if more be demanded than is due, the excess may be remitted (h); so, where the debt or duty is composed of several parcels, a demand of more than is due may be aided by a *remittitur* (i).

• In an action against several defendants, if the jury sever the damages by mistake, the plaintiff, by entering a *remittitur* as to the lesser damages, may have judgment for the greater damages against all the defendants. (Vol. 1, 309, 312) (k).

(a) See form of judgment for plaintiff by *nil dicit* in ejectment, with a *remittitur damna*, Chit. Forms, 443.

(b) See the form, Chit. Forms, 325.

(c) *Persevol v. Spencer*, Yelv. 43; *Wray v. Lister*, 2 Str. 1110; *Coy v. Hyman*, Id. 1171; Vol. 1, 309, 312.

(d) MS. M. 1314; *Usher v. Dansey*, 4 M. & Sel. 94. See *Wray v. Lister*, 2 Str. 1110; *Pickwood v. Wright*, 1 H. Bl. 643; *Mills v. Funnell*, 4 D. & R. 561, 2 B. & C. 339, S. C.

(e) 1 Saund. 235, (n. 5).

(f) 1 Ro. Abr. 784, R. pl. 2; 785, S. pl. 1; Com. Dig. Pleader, C. 48.

(g) 1 Saund. 235a. See *Coy v. Hyman*, 2 Str. 1171.

(h) *Ingledeu v. Cripps*, 2 Salk. 659, 7 Mod. 87, 2 Ld. Raym. 314, S. C.; *Morris v. Golder*, Id. 317, Carth. 437, S. C.

(i) *Pemberton v. Shelton*, Cro. Jac. 499; *Ingledeu v. Cripps*, 2 Ld. Raym. 315, 7 Mod. 88, S. C.

(k) See form of the entry of a *remittitur* of the damages generally, Chit. Forms, 403; of damages in *replevin* by defendant, Id. 525; of part of the debt demanded, Id. 394; upon some of several counts, Id. 424.

## CHAPTER XXVII.

## NEW TRIAL.

IF any error in the proceedings appear upon the face of the record, the party injured by it has his remedy by demurrer, motion in arrest of judgment, or writ of error, according to circumstances. But if any defect of judgment happen from causes wholly extrinsic, arising from matter foreign to or dehors the record, the only remedy the party injured by it has, (if we except the writ of error *coram nobis* in some few cases), is by application to the Court for a new trial. This application for a new trial was substituted for a bill of exceptions (*a*).

*In what cases.*] The Court must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case, before they will grant a new trial (*b*).

If the Judge misdirect the jury (*c*), even in a penal action (*d*), it is in general a good ground for a new trial; unless the Court be satisfied that justice has been done between the parties, notwithstanding the misdirection (*e*). So, if the sheriff or his deputy misdirect the inquest, the Court, upon application, will set aside the execution of the writ of inquiry (*f*), unless it appear that substantial justice has been done between the parties. So, if a Judge improperly nonsuit the plaintiff, a new trial will in general be granted (*g*); but the Court of Common Pleas have refused it, where it was not desired upon the part of the plaintiff at the trial that the cause should go to the jury (*h*); and in another case, where the plaintiff had elected to be nonsuit, because the Judge directed the jury to give only nominal damages (*i*). Where the Judge, on summing up a case, directed the jury, if they came to a certain conclusion, to give their verdict for the plaintiff, but if they came to either of two other conclusions, which he pointed out, to find

(*a*) See *Bernasconi v. Farebrother*, 3 B. & Adol. 372.

(*b*) 3 Bl. Com. 392. See *Re v. Mawbey*, 6 T. R. 638; *Edge v. Frost*, 4 D. & R. 243.

(*c*) *Anon.* 2 Salk. 649; *How v. Strobe*, 2 Wils. 269, 273.

(*d*) *Wilson v. Rastall*, 4 T. R. 753; *Brooke v. Middleton*, 1 Camp. 450; *Calcraft v. Gibbs*, 5 T. R. 19.

(*e*) *Edmonson v. Machel*, 2 T. R. 4. See *Cor v. Kitchin*, 1 B. & P. 338; *Calcraft v. Gibbs*, 5 T. R. 20; *Robinson v.*

*Cook*, 6 Taunt. 636; *Wickes v. Clutterbuck*, 2 Bingh. 483.

(*f*) *Markham v. Middleton*, 2 Str. 1259.

(*g*) *Rice v. Shute*, 5 Bur. 2612; *Sadler v. Evans*, 4 Id. 1986; *Buscall v. Hogg*, 3 Wils. 146; *Rackham v. Jesup*, Id. 338.

(*h*) *Kindred v. Bagg*, 1 Taunt. 10. See *Pickering v. Dowson*, 4 Taunt. 779; *Robinson v. Cook*, 6 Id. 336.

(*i*) *Butler v. Dorant*, 3 Taunt. 229.

for the defendant, and state on which ground their judgment was formed; and the plaintiff then chose to be nonsuited: it was held that he was not entitled to a new trial, on account of misdirection, if either of the two latter points was rightly put to the jury (*j*). Also, if a Judge at the trial, or a sheriff upon the execution of a writ of inquiry, admit improper evidence (*k*), or reject evidence which ought to be admitted (*l*), by which means the result of the trial or inquiry has been different from what it otherwise would have been, the Court will in general grant a new trial, or set aside the execution of the writ of inquiry. But the Court have refused to grant a new trial upon the ground of the improper rejection of evidence, where that evidence went to prove merely a fact which had already been proved by other means (*m*); and the Court of Common Pleas refused a new trial for the improper admission of evidence, where there appeared to be sufficient evidence to support the verdict, independently of the evidence so admitted (*n*). Also, where a bill of exceptions has been tendered, the Court will never grant a new trial upon the same point of law, unless the party consent to waive his bill of exception (*o*).

Where the undersheriff who returned the panel, was attorney for the party for whom the verdict was found, the Court granted a new trial (*p*). Also, if a juror have been sworn upon the jury by a wrong surname (particularly where he was not the person summoned or intended to be sworn), a new trial will be granted (*q*); but otherwise if sworn by a wrong christian name (*r*). It is discretionary, however, with the Court, to grant a new trial in such a case or not; and they will not do so, unless the mistake as to the juror have been productive of some injustice (*s*). They have set aside the execution of a writ of inquiry, however, where the persons composing the inquest were prisoners for debt, and taken out of custody for the purpose of serving on the inquest; and the Court said, that if the sheriff had been made a party to the rule, they would have obliged him to pay the costs (*t*).

If the jury find a verdict contrary to evidence, the Court will in general grant a new trial (*u*), even in the case of a trial at bar (*x*), particularly if the justice of the case require it (*y*). But if the verdict be such as the justice and equity of the case required, although it be contrary to evidence, yet the Court will not disturb it (*z*).

(*j*) *Vacher v. Cocks*, 1 B. & Adol. 145.

(*k*) *Tutton v. Andrews*, Barnes, 440.

(*l*) *Smedley v. Hill*, 2 W. Bl. 1105.

(*m*) *Edwards v. Evans*, 3 East, 451; *Rex v. Teal*, 11 East, 311; *Alexander v. Barker*, 2 C. & J. 133.

(*n*) *Horford v. Wilson*, 1 Taunt. 12; and see *Doe d. Teynham v. Tyler*, 6 Bingh. 501.

(*o*) *Fabrigas v. Mostyn*, 2 W. Bl. 929, Cowp. 161, S. C. See *Minchin v. Clement*, 1 B. & Ald. 252.

(*p*) *Baylis v. Lucas*, Cowp. 112; but see *Mason v. Vickery*, 1 Smith, 304.

(*q*) *Norman v. Beaumont*, Willes, 484, Barnes, 453, S. C.; *Wray v. Thorn*, Id. 454; *Parker v. Thornton*, 1 Str. 640,

2 Ld. Rayn. 141, S. C.; Vol. 1, 294; and see *Dovey v. Holson*, 6 Taunt. 460.

(*r*) *Hill v. Yates*, 12 East, 231, n.; and see *Wray v. Thorn*, Willes, 488.

(*s*) *Hill v. Yates*, 12 East, 229.

(*t*) *Stainton v. Beadle*, 4 T. R. 473.

(*u*) *Bright v. Eynon*, 1 Bur. 390.

(*x*) *Musgrave v. Nevinson*, 2 Ld. Rayn. 1358.

(*y*) *Morris v. Cleasby*, 1 M. & Sel. 576.

(*z*) *Wilkinson v. Payne*, 4 T. R. 468; *Simpson v. Appleyard*, 3 Wils. 273; *Goslin v. Wilcock*, 2 Id. 302; *Aylett v. Lowe*, 2 W. Bl. 1221; *Forcroft v. Devonshire*, 2 Bur. 936; *Denn v. Burnard*, Cowp. 597; but see 3 B. & Ald. 692.

So, if a verdict be found for the defendant against evidence, in a vexatious or hard action; or for the plaintiff, after an unconscionable defence set up by the defendant; a new trial will not be granted (*a*).

Nor will the Court grant it in any other cases of strict right or *summum jus*, where the rigorous exaction of extreme legal justice would be hardly reconcileable to conscience. Where a man recovered a sum composed of several items, some of which he was not in strict law entitled to recover under the declaration in that action, but which he would clearly be entitled to recover in a different form of action, the Court refused to grant a new trial, or reduce the damages (*b*).

Also, where evidence has been given on both sides, the Court will seldom grant a new trial, unless the evidence against the verdict very strongly preponderate (*c*). Yet in a question relating to real property, where the inheritance would be for ever bound by the verdict, the Court of Common Pleas granted a new trial, although the case had been left to the jury upon conflicting evidence (*d*).

For excessive damages, the Court will grant a new trial of course, or set aside the execution of a writ of inquiry, in all cases where the damages may be ascertained by mere calculation (*e*); and in other cases of actions *ex contractu*, if it appear clearly that the damages are excessive. But in actions *ex delicto*, such as actions for trespass (*f*), for diverting a water-course (*g*), for criminal conversation (*h*), seduction (*i*), battery (*k*), false imprisonment (*l*), or other personal torts (*m*), malicious prosecution (*n*), slander (*o*), or the like (*p*), a new trial is seldom granted on this account, unless the damages be outrageous (*q*), or the Court be satisfied that the jury acted under the influence of undue motives, or of gross error or misconception (*r*); and the same, as to the execution of writs of inquiry (*s*). It is very usual in cases of assault, where an excessive

(*a*) *Macrao v. Hull*, 1 Bur. 11; *Farewell v. Chaffey*, Id. 54; *Revelly v. Mainwaring*, 3 Id. 1306; *Dunkly v. Wade*, 2 Salk. 653; *Smith v. Brampston*, Id. 644, 1 Ld. Raym. 62, 5 Mod. 37, S. C.; *Sparks v. Spicer*, 2 Salk. 648.

(*b*) *Mayfield v. Wadsley*, 3 B. & C. 357, 5 D. & R. 224, S. C.

(*c*) *Ashley v. Ashley*, 2 Str. 1142; *Doe d. Mason v. Mason*, 3 Wils. 63; *Swain v. Hall*, Id. 47; *Anon.* 1 Id. 22. See *Norris v. Freeman*, 3 Id. 33.

(*d*) *Swinnerton v. Murquis of Stuford*, 3 Taunt. 91; see Id. 232, S. C.; *Lee v. Shore*, 2 D. & R. 198, 1 B. & C. 94, S. C.; *Hodgson v. Forster*, 2 D. & R. 221, 1 B. & C. 110, S. C.

(*e*) See *Day v. Edwards*, 1 Taunt. 491.

(*f*) *Benson v. Frederick*, 3 Bur. 1845; *Ducker v. Wood*, 1 T. R. 277; *Merest v. Harvey*, 5 Taunt. 442, 1 Marsh. 139, S. C.

(*g*) *Pleydell v. Earl of Dorchester*, 7 T. R. 529; 1 Chit. Rep. 729, (*a*).

(*h*) *Duberley v. Gunning*, 4 T. R. 651;

*Wilford v. Berkeley*, 1 Bur. 609. See *Chambers v. Caulfield*, 6 East, 244.

(*i*) *Irwin v. Dearman*, 11 East, 23; *Tullidge v. Wade*, 3 Wils. 18.

(*k*) *Jones v. Sparrow*, 5 T. R. 257; *Grey v. Grant*, 2 Wils. 252.

(*l*) *Huckle v. Money*, 2 Wils. 205; *Leiman v. Allen*, Id. 160; *Beardmore v. Currington*, Id. 244.

(*m*) *Fabrigus v. Mostyn*, 2 W. Bl. 929; *Gilbert v. Hurlenshaw*, Cowp. 230.

(*n*) *Leith v. Pope*, 2 W. Bl. 1327; *Norris v. Tyler*, 1 Cowp. 37.

(*o*) *Smith v. Brampston*, 2 Salk. 644.

(*p*) See *Bennett v. Alcott*, 2 T. R. 166.

(*q*) *Price v. Severne*, 7 Bingh. 316; *Sharpe v. Brice*, 2 W. Bl. 942; *Leith v. Pope*, Id. 1327; *Pleydell v. Earl of Dorchester*, 7 T. R. 529; *Bruce v. Rawlins*, 3 Wils. 61.

(*r*) *Chambers v. Caulfield*, 6 East, 244.

(*s*) *Benson v. Frederick*, 3 Bur. 1485; *Bruce v. Rawlins*, 3 Wils. 61, 63; *Irwin v. Dearman*, 11 East, 23.

verdict has been given, for the Judge to suggest to the counsel to agree on a sum, to prevent the necessity of a new trial (*t*).

On the other hand, a new trial will not be granted, nor the execution of a writ of inquiry set aside, on the account of the smallness of the damages (*u*), unless it have arisen from some mistake in point of law, either upon the part of the Court (*v*), or of the jury (*x*), or from some unfair practice upon the part of the defendant (*y*).

Also, the Court will not grant a new trial, where the value of the matter in dispute, or the amount of damages to which the plaintiff would be fairly entitled, is too inconsiderable to merit a second examination (*z*). The value or amount must be twenty pounds at least, to induce the Court to interfere, unless the verdict involve some particular right, independent of the damages (*a*). The Court will, however, sometimes grant a new trial, though the verdict be under 20*l*., where they can grant it without costs (*b*).

After payment of money into court (*c*), or after the service of the allowance of a writ of error, by a defendant (*d*), the Court have also refused to grant a new trial, deeming these acts acknowledgments of the truth of the case, as stated in the declaration.

In penal actions, if there be a verdict for plaintiff, the Court will grant a new trial in the like cases as in other actions; but if the jury have found a verdict for the defendant, a new trial is never granted (*e*), unless for the mistake or misdirection of the Judge. (*Ante*, 816, 817).

On the other hand, if upon issue joined on a plea in abatement, the jury find against the defendant, the Court will not grant a new trial, even upon payment of costs (*f*).

For the misconduct of the jury, also, the Court will in general grant a new trial, if the misconduct be such as to satisfy the Court that the verdict has been determined on, without that grave and serious deliberation, that right exercise of judgment, and that total absence of all partiality, so necessary to the proper execution of the important duties of jurymen: thus, if the jurors eat or drink at the expense of the party for whom they afterwards find a verdict; or if they determine their verdict by lots; (*Vol.* 1, 284); or if they or any of them have previously declared that the plaintiff should never have a verdict (*g*); or the like: the Court will set aside the verdict, and grant a new trial. But if the information of such misconduct come

(*t*) *Per Alderson, J.*, 7 Bingham 320.

(*u*) *Hayward v. Newton*, 2 Str. 940; *Barker v. Dixie*, Id. 1051; *Mauricet v. Brecknock*, 2 Doug. 509, 510.

(*v*) *Markham v. Middleton*, 2 Str. 1259; *Noble v. Kennaway*, 2 Doug. 510.

(*x*) *Woodford v. Eades*, 1 Str. 425; *Levy v. Baillie*, 7 Bingham 349.

(*y*) *Wits v. Polehampton*, 2 Salk. 647. See *Hall v. Stone*, 1 Str. 515.

(*z*) *Marsh v. Bowser*, 2 W. Bl. 351; *Macrow v. Hull*, 1 Bur. 11; *Burton v. Thompson*, 2 Id. 664; *Roberts v. Karr*, 1 Taunt. 495; *MS. E.* 1814; and see *Vernon v. Hankey*, 2 T. R. 113.

(*g*) See *Dyball v. Duffield*, Tidd, 9th ed. 910; 1 Chit. Rep. 265; 1 Y. & J. 402; *Bevan v. Jones*, 2 Y. & J. 264; *Young v. Harris*, 2 C. & J. 14.

(*b*) *Anon. v. Philips*, 1 C. & M. 26.

(*c*) *Burrough v. Skinner*, 5 Bur. 2639.

(*d*) Tidd, 9th ed. 913.

(*e*) *Brook v. Middleton*, 10 East, 268; *Mathison v. Allanson*, 2 Str. 1238; *Jervois v. Hull*, 1 Wils. 17; *Fonereau v. —*, 3 Wils. 59.

(*f*) *Shaw v. Hislop*, 4 D. & R. 241.

(*g*) *Dent v. Hundred of Hertford*, 2 Salk. 645; 2 Comyns, 601.



from any of the jurors, or from the unsuccessful party, the Court will not receive it (*h*), although in some degree confirmed *aliunde* (*i*). Nor is it, of itself, a sufficient ground for a new trial, that, upon an adjournment at night, in the midst of a trial, the jury separated, although such separation was without the permission of the Judge or consent of the parties, and was not in fact known until after the verdict (*j*). Even an admission by jurymen that the verdict was entered by mistake made after they had separated, though on the day of trial, is not a sufficient ground for a new trial (*k*).

A new trial has been granted on account of the non-attendance of a material witness (*l*); and the Court have granted it without costs, where a material witness for the defendant was kept out of the way by the contrivance of the plaintiff, to prevent him from being served with a *subpœna* (*m*). The Court have also granted a new trial, where it appeared clearly that the plaintiff's case was a mere fiction supported by perjury, which the defendant could not at the time of the trial be prepared to answer (*n*). The Court, however, will not in general be satisfied with the mere affidavit of the party making the application, contradicting the witnesses on the other side (*o*); the witnesses must in general be indicted, or some other satisfactory proof must be offered to the Court, of the perjury. Even where the witnesses were indicted, we have seen (*ante*, 755), that the Court in a recent case refused to stay execution until the indictment should be tried (*p*). If a witness, however, make a mistake in his evidence, by reason of which a verdict was given against the party who called him, the Court will not grant a new trial on this account, even although the mistake be explained to them by the affidavit of the witness himself (*q*). Also, an objection to the competency of witnesses, discovered after the trial, is not of itself a sufficient ground for a new trial; although it may have some weight with the Court, where the party applying appears to have merits (*r*).

If the party, for whom a verdict is afterwards given, deliver to the jury after they have left the bar, evidence which has not been shewn to the Court, a new trial will be granted. (*Vol.* 1, 284.) So, if he have laboured the jury, or used improper influence with them, to induce them to give a verdict in his favour, a new trial will be granted. Where handbills reflecting on the plaintiff's character were distributed in court, and shewn to the jury on the day of trial, a verdict against him was set aside upon application, and a new trial granted,

(*h*) *Faise v. Delaval*, 1 T. R. 11; *Onions v. Naish*, 7 Price, 203; *Hartwright v. Badham*, 11 Price, 383.

(*i*) *Owen v. Warburton*, 1 N. R. 326. See *Hindle v. Birch*, 8 Taunt. 26.

(*j*) *Rex v. Kinnear*, 2 B. & Ald. 462, 1 Chit. Rep. 401, S. C.

(*k*) *Davis v. Taylor*, 2 Chit. Rep. 268. See a case where all the jury were not present when the verdict was given. *Rex v. Woodler*, 2 Stark. 111, 6 M. & Sel. 366, S. C.

(*l*) *Anon.* 2 Salk. 645.

(*m*) Bul. N. P. 328.

(*n*) *Fabritius v. Cock*, 3 Bur. 1771.

(*o*) *Faise v. Parkinson*, 4 Taunt. 640; but see *Lister v. Mundell*, 1 B. & P. 427.

(*p*) *Warwick v. Bruce*, 4 M. & Sel. 140. See *Thurtell v. Beaumont*, 1 Bingh. 339, 8 Moore, 612, S. C.

(*q*) *Huish v. Sheldon*, Say. 27; but see *Richardson v. Fisher*, 1 Bingh. 145, *cont.*

(*r*) *Turner v. Pearse*, 1 T. R. 717.

although the defendant by his affidavit denied all knowledge of the handbills (*s*). But merely desiring a juror to attend at the trial of the cause is no ground for a new trial (*t*).

So, where by a fraudulent trick upon the part of the defendant, the plaintiff's counsel were taken by surprise, and the defendant thereby obtained a verdict, the Court granted a new trial (*u*).

Where a new trial was applied for, on account of a variance between the issue delivered and the *nisi prius* record, the Court refused it (*x*). But in an action on a replevin bond, where the plaintiff was nonsuit because of a variance between the replevin bond and the record, the Court of Common Pleas gave them leave to amend, upon payment of costs, and ordered a new trial (*y*). If the plaintiff have given no notice of trial, or an insufficient notice, the Court will grant a new trial (*z*); so, if no notice of executing a writ of inquiry, or an insufficient notice, be given, the Court will set aside the execution of the writ (*a*). But these irregularities are waived, by the defendant appearing and making a defence (*b*).

The Court have granted a new trial, where a verdict has been obtained against a party, on account of the absence of his counsel (*c*); but such instances are very rare, and particularly of late. Where a cause was called on, and tried as an undefended cause in consequence of the defendant's attorney neglecting to deliver his briefs, the Court of Common Pleas indeed granted a new trial, but ordered the defendant's attorney to pay the costs, as between attorney and client, out of his own pocket (*d*). So, where a cause, in the written list for the day, was tried out of its order, as an undefended cause, in the absence of the defendant's attorney, the Court granted a new trial, upon payment of costs, and an affidavit of merits (*e*); and even if it were not in the written list, the Court would not grant a new trial except upon an affidavit of merits (*f*). The Court will not grant a new trial even on payment of costs, where the defendant or his attorney, having an opportunity of trying, carelessly permits a verdict to be taken against him as in an undefended cause (*g*).

A new trial will seldom be granted, where a verdict has been given against a party, or a plaintiff has been nonsuit, for want of evidence

(*s*) *Coster v. Moreat*, 3 B. & B. 272, 7 Moore, 87, S. C.

(*t*) *Snell v. Timbrell*, 1 Str. 643.

(*u*) MS. E. 1814. See *Anderson v. George*, 1 Bur. 352; *Edie v. East India Company*, 1 W. Bl. 298; *Hewlett v. Cruchley*, 5 Taunt. 277.

(*x*) *Mather v. Brinker*, 2 Wils. 243; *Doe d. Cotterill v. Wylde*, 2 B. & Ald. 472; *Jones v. Tatham*, 8 Taunt. 634.

(*y*) *Halhead v. Abrahams*, 3 Taunt. 81; *Williams v. Pratt*, 5 B. & Ald. 896, S. P.

(*z*) *Thermolin v. Cole*, 2 Salk. 646.

(*a*) *Yate v. Swaine*, Barnes, 233.

(*b*) *Thermolin v. Cole*, 2 Salk. 646; *Yate v. Swaine*, Barnes, 233; and see *Doe d. Antrobus v. Jepson*, 3 B. & Adol. 402; *Truax v. Puravethini*, 4 Taunt. 545.

(*c*) *Avon*, 2 Salk. 645.

(*d*) *Dé Rousigny v. Peule*, 3 Taunt. 484.

(*e*) *Foudrinier v. Brudbury*, 3 B. & Ald. 328.

(*f*) *Blackhurst v. Bulmer*, 5 B. & Ald. 907, 1 D. & R. 553, S. C.

(*g*) *Breach v. Casterton*, 7 Bingh. 224; and see *Masters v. Barnwell*, *id.*, note; and *Gwillt v. Crawley*, 8 Bingh. 144; *ante*, Vol. 1, 273.

which might have been produced at the trial (*h*), unless the verdict be manifestly against the justice and equity of the case (*i*). And where a verdict passed against a defendant, and a material witness for him arrived on the following day, the Court of Common Pleas refused him a new trial, because he had not moved to put off the first trial on account of the absence of the witness (*k*). But if new evidence have been discovered after the trial, the Court will grant a new trial upon payment of costs, if it be necessary, in order to do justice between the parties. Where the defendant was sued as executor, and was absent from the kingdom at the time the action was brought, the Court of Common Pleas granted a new trial, upon the discovery of evidence after verdict for the plaintiff, although such evidence was in the possession of the defendant's attorney at the time of the trial, but not known by him to be so (*l*). The Court, however, will not grant a new trial, to let the party into a defence of which he was apprized at the first trial (*m*). But where, in an action for a nuisance, which was defended by the defendant's landlord, the defendant not attending at the trial in consequence of his being told that he need not do so, the attorney employed by the landlord entered into a consent rule to abate the nuisance, without the consent and against the directions of the defendant: the Court, upon strong affidavits shewing that the grievance complained of was not a nuisance, set aside an attachment which had issued on the consent rule, and granted a new trial (*n*).

When a verdict is taken subject to the opinion of the Court on a special case, and the special case turn out to be so defectively stated that the Court cannot give judgment upon it, a new trial will be granted (*o*).

Where a Welsh cause was tried in Monmouthshire instead of Hereford, the Court refused to set aside the verdict on that account, as the notice of the trial was for Monmouthshire, and the defendant did not object to it; besides the objection appeared upon the record, and therefore, if well founded, the party had another remedy (*p*).

If the jury at the second trial find for the party against whom the former verdict was given, the Court, if the case be doubtful, or the second verdict do not accord with the justice of the case, may be induced under circumstances to grant a third trial. It is entirely in the discretion of the Court, however, to do so or not; for the losing party, in such a case, is not entitled to it by any rule or practice of the Court (*q*); and they have accordingly refused it where the second verdict was satisfactory (*r*). It is also in the discretion of the Court

(*h*) *Cooke v. Berry*, 1 Wils. 98; *King v. Allerton*, 3 Salk. 361. See *Wits v. Polehampton*, 2 Salk. 647; *Spong v. Hogg*, 2 W. Bl. 802.

(*i*) *Martyn v. Podger*, 5 Bur. 2631.

(*k*) *Elmslie v. Wildman*, 8 Taunt. 236.

(*l*) *Broadhead v. Marshall*, 2 W. Bl. 955.

(*m*) *Vernon v. Hankey*, 2 T. R. 113.

See *Burton v. Mardin*, 1 T. R. 84; *Ritchie v. Bousfield*, 7 Taunt. 309.

(*n*) *Bodington v. Harris*, 1 Bing. 187.

(*o*) *David v. Herring*, 1 Str. 300; and see *Hankey v. Smith*, 3 T. R. 507, *n.*; Vol. 1, 306.

(*p*) *Ambrose v. Rees*, 11 East. 370.

(*q*) *Parker v. Ansel*, 2 W. Bl. 963.

(*r*) *Id.*

to grant a third trial after two concurring verdicts (*s*). But this is seldom done; and the Court have refused to grant it, after a new trial for excessive damages, and the same damages given by the second verdict (*t*); and the same where the two concurring verdicts were for the defendant, even although the Judge before whom the second trial was had, expressed himself dissatisfied with the verdict (*u*). But where in such a case the action was brought for a matter savouring of the realty, and the plaintiff would have been concluded by the verdict, the Court, under circumstances, set aside the last verdict and ordered a nonsuit to be entered, leaving the plaintiff to contest the matter a third time, if he would (*x*).

Where there are several issues, and a verdict on one of them is found against evidence, the Court cannot grant a new trial as to that issue only, but must grant it as to all the issues, if they grant it at all (*y*). And the issue thus found against evidence must be a material issue, to induce the Court to grant the new trial (*z*).

In ejectment, where the verdict is for the defendant, the Court will seldom grant a new trial, because the plaintiff may, if he will, bring a new action; but otherwise, if found for the plaintiff, and the circumstances of the case in other respects warrant them in granting it (*a*).

In replevin, where the verdict is for the plaintiff, the Court will be more cautious in granting a new trial than in other actions, and will not grant it unless upon very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying double costs (*b*).

As to new trials in cases of issues out of Courts of equity, see *Vol. 1*, 466 (*c*).

If the Judge at the trial, when there is a doubt whether the action will lie, allows the plaintiff to take a verdict, but allows the defendant to move to set aside the verdict, and enter a nonsuit, the defendant may move accordingly, and so obtain the opinion of the Court upon the subject; but without such leave, he cannot move to enter a nonsuit. (*Vol. 1*, 301) (*d*). So, where a plaintiff has been nonsuit, the Court may order the nonsuit to be set aside, and a verdict entered for him, if the Judge at *Nisi Prius* gave him leave to move to that effect (*e*), but not otherwise.

Where the plaintiff has died after verdict, the Court may grant a new trial on the application of the defendant, and would in such case

(*s*) *Goodwin v. Gibbons*, 4 Bur. 2108.

(*t*) *Clerk v. Udall*, 2 Salk. 649; *Chambers v. Robinson*, 2 Str. 692.

(*u*) *Swinerton v. Marquis of Stafford*, 3 Taunt. 232.

(*x*) *Lee v. Shore*, 2 D. & R. 190, 1 B. & C. 94, S. C.

(*y*) *Bul. N. P.* 326; *Bernasconi v. Farebrother*, 3 B. & Adol. 372; but see *Hutchinson v. Piper*, 4 Taunt. 555.

(*z*) *Bul. N. P.* 326.

(*a*) *Goodtitle v. Alexander v. Clayton*,

4 Bur. 2224; *Wright v. Clymer v. Little*, 2 Id. 1244, 1 W. Bl. 343, S. C. See *Smith v. Dorney v. Parkhurst*, 2 Str. 1105; *ante*, 538.

(*b*) *Parry v. Duncan*, 7 Bligh. 243.

(*c*) And see *Carstairs v. Stein*, 4 M. & Sel. 195.

(*d*) *Minchin v. Clement*, 1 B. & Ald. 252; *Watkins v. Towers*, 2 T. R. 275 to 281.

(*e*) *Treacher v. Hinton*, 4 B. & Ald. 413.

impose terms on him to prevent his taking advantage of the plaintiff's death (*f*).

*How obtained, &c.*] The motion for a rule to shew cause why a verdict should not be set aside, and a new trial granted, is made in the court from which the *venire* issued, even in cases where the action is brought under the Lord Chancellor's orders (*g*); but in the case of an issue out of Chancery, the motion, we have seen, (*Vol.* 1, 466), may be made, either in the court by which the issue was ordered, or in that by which the *venire* was awarded (*h*). Afterwards, upon shewing cause, if the grounds upon which the rule was granted still seem sufficient, and either appear upon the face of the Judge's report, or be substantiated by affidavit, and no sufficient cause be shewn against it, the Court will make the rule absolute. And the Court will look only to the Judge's report, for the evidence given at the trial, and the manner in which the Judge summed up the case (if that be stated in it), and will not attend to any contrary statement of them by counsel.

When the action is against several defendants, the application should be made on the behalf of all of them; and therefore, where one defendant is found guilty and the other acquitted, it was holden that the former could not have a new trial (*i*). So, in trespass against several, where the verdict was contrary to evidence as to one of them, a new trial was refused (*k*).

The motion for the rule *nisi* must be made within four days after the *distringas* is returnable (*l*); unless under particular circumstances (*m*), in which case the Court may, in their discretion, allow a new trial to be moved for at any time before judgment has been actually signed (*n*). The four days are reckoned inclusive of the first and last day, but Sunday, though not the last, is not reckoned one (*o*), nor does any other day on which the Court do not sit (*p*). If the cause be tried at the sittings in term a new trial may be moved for at any time within four days after the return of the *distringas*, although more than four days have elapsed since the trial (*q*). If there be not so many as four days in the term after the return of the *distringas*, then the motion must be made on or before the last day of the term (*r*). This rule as to the moving within the four days after the *distringas* is returnable, is

(*f*) *Griffith v. Williams*, 1 C. & J. 47, and a case in K. B. there cited.

(*g*) *Carstairs v. Stein*, 4 M. & Sel. 192.

(*h*) See *Tidd*, 913.

(*i*) *Parker v. Godin*, 2 Str. 814; but see *Rex v. Mawbey*, 6 T. R. 638; and see *Cooper v. South*, 4 Taunt. 802.

(*k*) *Sir Charles Berrington's case*, 3 Salk. 362.

(*l*) *Kirkman v. Marter*, 2 B. & Ald. 613; 1 Chit. Rep. 382; *Mason v. Clarke*, 1 C. & J. 411; *Birt v. Barlow*, 1 Doug. 171; *Rex v. Holt*, 5 T. R. 436; *Les v.*

*Carlton*, 3 Id. 642.

(*m*) *Birt v. Barlow*, 1 Doug. 171.

(*n*) *Rex v. Gough*, 2 Doug. 797; and see *Rex v. Holt*, 5 T. R. 436; 1 G. 4, c. 37, s. 3; *ante*, 567.

(*o*) *Tidd*, 9th ed. 912; *Kirkham v. Marter*, 1 Chit. Rep. 382, 2 B. & Ald. 613, S. C.

(*p*) *Bromley v. Foster*, 1 Chit. Rep. 562.

(*q*) *Mason v. Clarke*, 1 Dowl. P. C. 288, 1 C. & J. 411, S. C.

(*r*) See *Kirkman v. Marter*, 2 B. & Ald. 613, 1 Chit. Rep. 382, S. C.

rigidly adhered to; and although when counsel cannot be heard on all the motions within the first four days, it is now of course on the fourth day of Michaelmas and Easter terms at the rising of the Court to allow those that cannot be heard within the time to be inserted in the list, and to be heard within the fifth and successive days (*s*); yet the Court censure any delay in moving for a new trial even to the last of the four days, and have expressed a wish that the motions when practicable should be made on the first and second days. And they will not in general allow any motion to be made upon the fourth day in Hilary or Trinity terms, although the counsel was instructed within the first four days, it being the fault of the parties not to have instructed him sooner, so as to enable him to move on the first or second day (*t*). The motion cannot in general be made after the four days, even though the parties consent thereto (*u*).

A new trial cannot in general be moved for, after motion in arrest of judgment (*x*); and the usual and proper course is, in cases where there may be a ground for moving in arrest of judgment, to move, at the time of moving for a new trial, in arrest of judgment also (*y*). It should seem indeed that the practice requiring the motion for a new trial to be made before that in arrest of judgment, extends only to cases where the party has knowledge of the fact at the time of moving in arrest of judgment, and therefore a new trial was granted after such motion, on an affidavit that the jury drew lots for their verdict (*z*).

The motion for a new trial cannot be made after error brought by the party making the application (*a*).

Any affidavits to be made use of in moving for it must also be sworn within the four days above mentioned, unless the special permission of the Court to the contrary be obtained for that purpose. (*R. T. 5 G. 4*) (*b*). It should also be observed, that the affidavits must in all cases be made before obtaining the rule *nisi*; and this rule is strictly adhered to.

Inasmuch as the granting of the rule *nisi* for a new trial suspends the judgment and execution, and occasions an accumulation of the heavier description of business, the Court (unless the Judge who tried the cause has expressed a strong opinion in favour of the application) will in the first instance invariably examine the grounds of the motion, and refuse it, unless there is a probable ground to expect that the rule will ultimately be made absolute. If the ground of the application is an irregularity in the proceeding, or on account of surprise, or the absence of counsel or attorney, or other mere practical point, the Court will direct that the rule *nisi* shall not be placed in the new trial paper, but come on for discussion as a common rule. But where the case requires the report of the Judge who tried the

(*s*) 3 C. & P. 111, *a*; Tidd's Sup. 159; Chit. Sum. Prac. 189.

(*t*) Chit. Sum. Prac. 189; Tidd's Sup. 159.

(*u*) *Kirkham v. Marter*, 1 Chit. Rep. 382; *Rex v. Holt*, 5 T. R. 436.

(*x*) *Philpot v. Page*, 4 B. & C. 160, 6

D. & R. 201, S. C.; *Tubervil v. Stamp*, 2 Salk. 647.

(*y*) *Id.*

(*z*) Bull. N. P. 326; Tidd, 913.

(*a*) Tidd, 913; but see 1 B. & P. 109, *n. contra*.

(*b*) 4 D. & R. 836; 3 B. & C. 176.

cause, to be read, then the rule *nisi* will come on in the new trial paper, on particular days for discussion of that description of business (c).

We have seen, (*ante*, Vol. 1, 316), that by the 1 W. 4, c. 7, s. 2, the Judge who tried the cause has power to certify that, in his opinion, execution ought to issue forthwith, or on some day to be named in such certificate, though before the next term; but that the 4th section still leaves the party affected by such certificate the right to apply to the Court, to set aside the judgment and execution, or stay the same, and to arrest the judgment, or grant a new trial. You should, in a case of this nature, make an affidavit, fully stating the facts, and move the Court as soon as possible (d).

The parties on the second trial, whether under special issues or the general issue, will be confined to the same issues raised on the first trial (e).

When the Court have granted the rule *nisi*, draw it up with the clerk of the rules (f); pay 5s.; and serve a copy of it upon the attorney or agent of the opposite party. Then, before the time of shewing cause, if the action were tried in London or Middlesex, deliver a note in writing (g) at the house or chambers of the Lord Chief Justice, "specifying the name of the cause, and the time and place where the same was tried, together with the nature of the motion;" (R. M. 40 G. 3); and if tried by any of the puisne Judges, some intimation should be given to his clerk, of the rule *nisi* having been granted, at least the evening before the case is to be argued. If the cause were tried in any other county, by a Judge of this Court, mention to his clerk that the rule *nisi* has been granted, and the Judge will take care to have his notes and minutes of evidence in court when the case is called on; if tried by a Judge of another Court, serve a copy of the rule *nisi* on his clerk, who will thereupon deliver the Judge's report of the trial to the junior puisne Judge of this Court. Deliver to your counsel one of the briefs in the original cause, together with such further instructions and observations as you may think fit; you may learn from the paper of causes at the office of the clerk of the papers the day the case will be argued. When it is called on, the Judge who tried the cause, or, if it were tried by a Judge of another Court, the junior puisne Judge, will read his report of the trial; after which the counsel on the opposite side shew cause against the rule, the counsel for the party who moved for the rule *nisi* speak in support of it, and the Court then state their opinion, and either discharge the rule or make it absolute. If the Court make it absolute, they may do so upon terms; if necessary; such as, that witnesses infirm or going beyond sea may be examined upon interrogatories; that certain deeds, books, papers, &c. may be produced at the trial; that certain facts, not intended to be litigated, may be admitted; or that the party may make

(c) Chit. Sum. Pract. 192.

(d) Chit. Sum. Pract. 193.

(e) *Thwaites v. Sainsbury*, 7 Bing. 437.

(f) See a form of rule *nisi* stating the grounds of motion, Chit. Forms, 721.

(g) See form, Chit. Forms, 722.

discovery of certain facts upon oath, in order to prevent the necessity of having recourse to a Court of equity for it.

*If made absolute, draw up the rule with the clerk of the rules; pay 5s. (h); and serve a copy on the plaintiff's attorney or agent; or, if made absolute upon payment of costs, get an appointment on the rule from the master, and serve a copy of the rule and appointment. Get the costs taxed, and pay them without delay; otherwise the opposite party may move to discharge the rule for a new trial, and that he may be at liberty to sign judgment. Where a plaintiff, after setting aside a nonsuit upon payment of costs, proceeded to a second trial without paying these costs, and obtained a verdict: the Court set aside the verdict, and gave the defendant leave to sign his judgment in the original action, unless the costs should be paid within ten days (i).*

If the rule be discharged, sign judgment and tax your costs, as in ordinary cases.

*Costs.*] It is entirely in the discretion of the Court, whether they will oblige the party applying for a new trial to pay costs, as a condition precedent to his proceeding to a second trial. Upon setting aside a nonsuit, or a verdict for misdirection of the Judge, the Court grant a new trial usually without costs (k).

Where the verdict was set aside for the misconduct of the jury, the Court ordered the costs to abide the event of the second trial (l); if set aside, because the verdict was contrary to law, or to the opinion or direction of the Judge, a new trial is granted usually without costs (m); but if, because the verdict was contrary to evidence, or because of excessive damages, the new trial is usually granted upon payment of costs (n).

If a party have obtained a verdict by trick, the Court will grant a new trial without costs, or, perhaps, in very gross cases, they will oblige him to pay the costs (o). So, where a new trial was granted because the plaintiff had a material witness for the defendant concealed in his house, and prevented him from being served with a *subpœna*, it was granted without costs (p).

If a new trial be granted upon a ground not opened at the first trial, it will be upon payment of costs (q).

If the rule be silent as to costs, the costs of the first trial are never allowed to the successful party, though he succeed on the second. (*R. H. 2 W. 4, r. 64*) (r). Where, after a verdict for the plaintiff, a

(h) See *Lopez v. De Tastet*, 8 Taunt. 712.

(i) *Nicholls v. Bozon*, 13 East, 185. See *Hullock*, 401.

(k) *Buscull v. Hoger*, 3 Wils. 146; *Vale v. Boyle*, Cowp. 297; *Harris v. Butterley*, 2 Id. 485; *Jackson v. Duchaire*, 3 T. R. 553; *Goodright v. Saul*, 4 Id. 359; *Hullock*, 388.

(l) *Hale v. Cove*, 1 Str. 642.

(m) *Hullock*, 387; *Furneaux v. Hut-*

*chins*, Cowp. 808; *Pochin v. Pawley*, 1 W. Bl. 670; *Jackson v. Duchaire*, 3 T. R. 551.

(n) *Anon.* 12 Mod. 370; *Macrow v. Hull*, 1 Bur. 12; *Bright v. Eynon*, Id. 393; *Burton v. Thompson*, 2 Id. 665.

(o) *Anderson v. George*, 1 Bur. 352. See *Hullock*, 391.

(p) *Bul. N. P.* 328.

(q) *Sutton v. Mitchell*, 1 T. R. 20.

(r) *Hullock*, 391.



new trial was obtained by defendant, and the rule was silent as to costs, and the plaintiff afterwards discontinued, the Court held the defendant was not entitled to the costs of the trial (*s*). But in another case, where the verdict was for the defendant, and the plaintiff obtained the rule for a new trial, and afterwards discontinued, it was held the defendant was entitled to the costs of the trial (*t*). In another case, when the defendant, who had obtained the rule, instead of proceeding to a second trial, gave the plaintiff a cognovit, the Court held him liable to pay the costs of the trial (*u*).

Where the costs are ordered to abide the event of the second trial, if the same party succeed in both trials, he shall have the costs of the first as well as the second (*x*); but otherwise the costs of the first shall not be allowed (*y*). By the "event of the second trial" is meant the ultimate event of the cause; and, therefore, if the verdict at the second trial be not set aside, and on the third trial the ultimate event be the same as upon the first trial, the party will be entitled to the costs of the first trial (*z*). After a verdict for a defendant, the Court made a rule absolute for a new trial, and ordered that the costs of the former trial should abide the event of such new trial: the record was carried down to the spring assizes following, and made a *remanet*: it was tried a second time at the summer assizes, when a verdict was again found for the defendant: the Court afterwards ordered that the verdict should be set aside, and a new trial had between the parties, upon payment of the costs of the last trial, and that the costs of the first trial should abide the event of such new trial: upon the third trial, a verdict was found for the plaintiff; and the Court held, that the plaintiff was entitled to the costs occasioned by the cause having been made a *remanet*, at the assizes next following the term when the first rule was made absolute for a new trial (*a*).

In an action upon a statute which gives double costs, if a new trial be granted on a rule ordering the payment of the costs of the first trial generally, it would mean the double costs (*b*).

When a new trial is granted to the defendant on payment of costs, the plaintiff should not carry down the cause for trial until they are paid; for if he do so, he will have no remedy for the costs of the former trial, even though he should again obtain a verdict (*c*).

*Amendment after.*] It is the practice to allow amendments to be

(*s*) *Gray v. Cor*, 5 B. & C. 458, 8 D. & R. 220, S. C.

(*t*) *Sweetmy v. Halse*, 9 B. & C. 369, n.; *Chapple v. Durston*, 1 C. & J. 111.

(*u*) *Jackson v. Halland*, 2 B. & Ald. 317, 1 Chit. Rep. 19, S. C. See *Payne v. Bailey*, 3 B. & B. 304, 7 Moore, 147, S. C.; *Elvin v. Drummond*, 1 M. & P. 88, 4 Bingh. 415, S. C.

(*x*) *Trelawney v. Thomas*, 1 H. Bl. 641; *Hudson v. Marjoribanks*, 1 Bingh. 393, 8 Moore, 440, S. C.

(*y*) *Austen v. Gibbs*, 8 T. R. 619; *Chapman v. Partridge*, 2 N. R. 382; *Bird v. Appleton*, 1 East, 111; *Howarth v. Samuel*, 1 B. & Ald. 566.

(*z*) *Meule v. Goddard*, 5 B. & Ald. 766.

(*a*) *Gibbons v. Phillips*, 8 B. & C. 437, 2 M. & R. 238, S. C.

(*b*) *Semble, Loader v. Thomas*, 1 C. & J. 54.

(*c*) *Doe d. Davi v. Haddon*, Tidd, 9th ed. 915.

made, on terms, after the trial, where the justice of the case requires it (*d*).

*The new trial.*] The party obtaining the rule is not bound to proceed to the new trial in any limited time (*e*). The former *nisi prius* record will answer, unless the *postea* have been indorsed upon it, in which case you must make out a new *nisi prius* record: if you use the former record, the *jurata* must be altered, in the same manner as when the cause is made a *remanet*. (See Vol. 1, 267) (*f*). Give notice of trial, sue out jury process, and enter your cause for trial, as in ordinary cases.

The second verdict alone appears upon the *postea*. Also, upon the judgment roll, no notice is taken of the first verdict, but the record proceeds as if the second verdict was the only one that was given (*g*).

If the plaintiff do not proceed to the second trial, the defendant may carry down the record by proviso; but he cannot do so, until after the next term or assizes from that in which the new trial was granted (*h*).

*Venire de novo.*] This is the old common law mode of proceeding to a second trial, and differs materially from the granting a new trial, inasmuch as the *venire de novo* is awarded for some defect appearing upon the face of the record, a new trial is granted for matter entirely extrinsic. But a *venire de novo* is not awarded for every defect appearing upon the face of the record, but for a defective finding in the verdict only (*i*). And it cannot be granted by a court of error (*k*). Where the verdict, however, can be amended, a *venire de novo* is never awarded.

Where a *venire de novo* is awarded, the party succeeding at the second trial is not allowed the costs of the first (*l*).

*Judgment non obstante veredicto.*] Where the defence put upon the record is not a legal defence to the action in point of substance, and the defendant obtains a verdict, the Court upon motion will give the plaintiff leave to sign judgment notwithstanding the verdict, provided the merits of the case be very clear. The judgment so signed

(*d*) *Tomlinson v. Blacksmith*, 7 T. R. 132; *Wilder v. Handy*, 2 Str. 1151; *Marshall v. Riggs*, Id. 1162; *Dennis v. Edwards*, Comb. 4. When not, see *Price v. Severn*, 7 Bingh. 402, 5 M. & P. 250, 1 Dowl. P. C. 215, S. C.

(*e*) *Buckle v. Hollis*, T. T. 1815, Tidd, 9th ed. 917, S. C.

(*f*) And see *Harper v. Davy*, 1 Ld. Raym. 510, Carth. 498, S. C.

(*g*) 2 Saund. 253 a, (n. 8).

(*h*) *Staffordshire and Worcestershire Canal Company v. The Trent and Mersey Canal Company*, 5 Taunt. 577.

(*i*) *Goodtitle v. Jones*, 7 T. R. 52;

*Witham v. Lewis*, 1 Wils. 55. See *Res v. Woodfall*, 5 Bur. 2661; *Holt v. Scholefield*, 6 T. R. 691; *Crowder v. Rooke*, 2 Wils. 144; *Hicks v. Keats*, 6 D. & R. 68, 4 B. & C. 69, S. C.

(*k*) *Trevor v. Wall*, 2 Doug. 732, n., 1 T. R. 151, S. C. See *Davies v. Pierce*, 2 T. R. 125; 2 Doug. 732, n.; *Roles v. Rosewell*, 5 T. R. 540; *Hardy v. Bern*, Id. 636.

(*l*) *Edwards v. Brown*, 1 C. & J. 354, 1 Tyr. 281, 1 Dowl. P. C. 282, S. C.; *Lickbarrow v. Mason*, 6 T. R. 131; *Bird v. Appleton*, 1 East, 111; *Hullock*, 391, 392.

is an interlocutory judgment; after which a writ of inquiry must be sued out and executed, and final judgment signed, as in ordinary cases (m); or if the damages be not material, as if the action have been brought to try a right or custom, or the like, the Court will set aside the verdict, and enter a verdict for the plaintiff with nominal damages (n). *The motion is for a rule to shew cause; which is afterwards made absolute or discharged, in the usual way.* The motion cannot be made after the expiration of four days from the time of trial, if there are so many days in term; nor in any case after the expiration of the term, provided the jury process be returnable in the same term. (*R. H. 2 W. 4, r. 65*).

(m) See *Clement v. Lewis*, 3 B. & B. 297, 7 Moore, 200, S. C.

(n) *Selly v. Robinson*, 2 T. R. 758; 6 Cb. 59 b.

## CHAPTER XXVIII.

## AMENDMENT.

## SECT. 1.

*Amendment, &c. generally.*

At any time *before judgment*, in ordinary cases, the proceedings may be amended by a Judge at chambers, upon summons calling upon the opposite attorney to shew cause why the party applying should not have leave to amend; in other cases the amendment may be obtained by application to the Court (a). Also, the Judge at *nisi prius*, upon application, may allow the record of *nisi prius* to be amended, and may order the clerk of *nisi prius* to amend it *instantly* (b), whether the Judge who tries the cause be a Judge of the Court in which the record was made up or not, (see 1 G. 4, c. 55, ss. 5, 6; Vol. 1, 62); and this whether the defect be in a material allegation or not (c). And by 9 G. 4, c. 15, Vol. 1, 282, in cases where a variance may appear between *written* or *printed* evidence, and the recital or setting forth thereof on the record, the Court or a Judge, sitting at *nisi prius*, may order the record to be amended on payment of costs. Also by 3 & 4 W. 4, c. 42, s. 23, already noticed, (*ante*, Vol. 1, 282), the Court or Judge at *nisi prius*, where there is a variance between *any matter* given in evidence (not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced,) and the statement of it on the record, may order the record to be amended, &c.

*After judgment and before error brought*, a Judge at chambers will not in general entertain the application, but it should be made to the Court; *the rule is a rule nisi, which is afterwards made absolute or discharged, as in ordinary cases.* After error brought upon a judgment of this Court, the application for leave to amend must be made here, because the record always in fact remains here; a transcript

(a) See form of the rule, Chit. Forms, 724.

(b) See *Murphy v. Marlow*, 1 Camp. 57.

(c) *Reid v. Smart*, Chit. Col. Stat. 735; *sed vide Paine v. Busten*, 1 Stark. 74. But, after an order of reference,

a Judge has no jurisdiction under the 1 G. 4, c. 55, s. 5, even during the same assizes, to make a second order to enable the defendant to amend his case by giving a particular of set-off. *Ashworth v. Heathcote*, 6 Bingh. 596, n., 4 M. & P. 396, S. C.

only being sent to the Court of error (d); but after error to this Court, the application may be made either here or in the inferior court (e).

The Court or Judge, upon granting leave to amend, may oblige the party applying to submit to such equitable terms as may be necessary to prevent the opposite party from being prejudiced by the amendment (f). If the amendment be made at the trial, it is with or without costs, at the discretion of the Judge; in other cases it is allowed usually upon payment of costs, particularly if the error or mistake have arisen from the default of the party, and not from the misprision of any of the officers of the Court. But if the amendment be made after error brought, it is usually upon payment of costs of the proceedings in error, provided the plaintiff proceed no further in his writ of error after notice of the amendment (g).

[What amendable at common law.] It may be necessary to premise that amendments in all cases are entirely in the discretion of the Court, and are allowed only in furtherance of justice (h). At common law, the Court may amend in all cases, whilst the proceedings are in paper, that is, until judgment signed, and during the term in which it is signed; for until then the proceedings are considered as only in *feri*, and consequently subject to the control of the Court (i). And there is no difference in this respect between penal and other actions (j); and the Court will accordingly permit the plaintiff in a penal action to amend, even after the time limited for bringing another action, provided there have been no unnecessary delay upon his part, and that the amendment required do not introduce any new cause of action (k); and in a late case the Court refused to allow an amendment in a penal action after much delay (l). After the term of which judgment is signed, the pleadings, &c. cannot be amended at common law, but by virtue of the statutes of amendments only (m).

After demurrer, general or special, and before argument, it is usual to give the other party leave to amend on payment of costs, (*ante*, 479) (n); and it has been given in many cases even after demurrer argued, but before judgment, where the justice of the case required it (o). The Court, however, have refused this to a plaintiff in a *qui*

(d) *Rutter v. Redstone*, 2 Str. 837; *Tidd*, 714; and see *Anon. Cro. Jac.* 429; *Grenville v. Smith*, Id. 628; *post*, 850.

(e) *Poph.* 102; *Richards v. Brown*, 1 Doug. 114; *Hillerson v. Skidsay*, 2 Str. 1182; *Tidd*, 9th ed. 714.

(f) *Alder v. Chip*, 2 Bur. 756; and see 1 Salk. 47; 3 Id. 31; *Havers v. Bannister*, 1 Wils. 7; *Low v. Newland*, Id. 76; *Waters v. Bovell*, Id. 223.

(g) *Baumont v. Cosin*, Barnes, 17; *Parsons v. Gill*, 2 Ld. Raym. 897. See *Moody v. Stracey*, 4 Taunt. 588; *Tidd*, 715.

(h) See *Rex v. Mayor, &c., of Gram-pound*, 7 T. R. 699.

(i) *Alder v. Chip*, 2 Bur. 756; *Cope v. Marshall*, Say. 285; 3 Bl. Com. 407;

*Tidd*, 697; *Morris v. Evans*, 1 Dowl. P. C. 657.

(j) *Richards v. Brown*, 1 Doug. 114.

(k) *Cross v. Kaye*, 6 T. R. 543; *Madock v. Hammett*, 7 Id. 55; *Wood v. Grimwood*, 10 B. & C. 689; *Tidd*, 9th ed. 711; *post*, 838, 837.

(l) *Wood v. Grimwood*, 10 B. & C. 689.

(m) *Co. Lit.* 260. See *Rex v. Bishop of Landaff*, 2 Str. 1011; *post*, 833.

(n) *Hatton v. Walker*, 2 Str. 846; *Bishop v. Stacy*, Id. 954; *Herbert v. Griffiths*, Id. 1181; *Watson v. Richardson*, 1 Wils. 226. See *Drummond v. Dorant*, 4 T. R. 360.

(o) 2 Saund. 5th ed. 402, and cases there cited; *Bishop v. Stacy*, 2 Str. 954; *Howell v. M'ivers*, 4 T. R. 690; *Steel v.*

*tam* action (*p*), in an action against bail (*q*), and in a hard action (*r*); and to a defendant, after the plaintiff had lost a trial (*s*). The party demurring, also, has been allowed to strike out a *similiter* which was entered in the issue by mistake (*t*). Also, under particular circumstances, the Court have allowed the defendant to withdraw his demurrer, and plead *de novo*, even after argument. (*Antef* 479) (*u*). What has been now mentioned holds good also where there are several issues in law and in fact, even after argument of the issues in law, but before the trial of the issues in fact; but if the issue in fact be tried first, and contingent damages assessed as to the demurrer, the Court, it seems, will not in that case allow either of an amendment, or of the demurrer being withdrawn (*v*). The Court would under circumstances refuse to allow a defendant to amend after a second demurrer to the same pleading (*x*).

After error brought, those things are amendable which were amendable before error brought, so long as diminution may be alleged, and a *certiorari* awarded (*y*).

*What amendable by statute.*] No process shall be annulled or discontinued for the misprision of the clerks in writing one syllable or letter [or word (*z*)] too much or too little; but as soon as the mistake is perceived, it shall be amended in due form. (14 *Ed. 3*, st. 1, c. 6). And the justices before whom the record is made, or shall be depending by way of error or otherwise, may amend the same, as well after as before judgment, in the same manner as they might have done by the above statute before judgment. (9 *H. 5*, st. 1, c. 4, made perpetual by 4 *H. 6*, c. 3). Neither of these statutes, however, extends to process of outlawry. (4 *H. 6*, c. 3).

So, the Court may amend whatever to them seemeth to be the misprision of the clerks, in any record, process, word, plea, warrant of attorney, writ, panel, or return, which may for the time be before them, so that no judgment shall be reversed by reason of such misprision. (8 *H. 6*, c. 12) (*a*). So, they may amend for the misprision of the clerks, and also of other officers, such as sheriffs, coroners, &c., defects in any record, process, or return before them by way of error or otherwise, in writing a letter or syllable too much or too little. (8 *H. 6*, c. 15).

*Sowerby*, 6 T.R. 173; *Hunt v. Puckmore*, Barnes, 155; *Mattravers v. Fossett*, 3 Wils. 295; *Hamilton v. Wilson*, 1 East, 391; *Potten v. Bradley*, 2 M. & P. 78, 81; *Edmonds v. Walter*, 2 Chit. Rep. 292. And the Court have allowed the amendment, without costs, even after argument; *Heydon v. Thompson*, MS. K. B. 9th Nov. 1833; and see *Solomon v. Lyon*, 1 East, 369; *post*, 841. See form of rule, Chit. Forms, 724.

(*p*) *Rox v. Holland*, 4 T. R. 459; *Evans v. Stevens*, Id. 228; *Wood v. Grimwood*, 10 B. & C. 689.

(*q*) *Sarby v. Kirkus*, Say. 117.

(*r*) *Noble v. King*, 1 H. Bl. 37.

(*s*) *Jordan v. Twells*, Hardw. 171.

(*t*) *Stephens v. Hudson*, (*Bail of*), 2 Ld. Raym. 1137.

(*u*) *Ayres v. Wilson*, 1 Doug. 385; *Waters v. Ogden*, 2 Id. 452; *Alder v. Chip*, 2 Bur. 756; *Chalmers v. Paxton*, 3 Bingh. 1, 2 M. & P. 127, S. C.; *sed vide per Littleale, J.*, *Hennworth v. Fowkes*, 1 Nev. & Mann. 330.

(*v*) *Robinson v. Raley*, 1 Bur. 322.

(*x*) See *Kinder v. Paris*, 2 H. Bl. 561.

(*y*) 8 Co. 162 a; 1 Doug. 115; *Tidd*, 9th ed. 714; *Tidd's Sup.* 129, and the cases of *Mellish v. Richardson*, 7 B. & C. 819, 11 Moore, 104, 3 Bingh. 334, S. C.

(*z*) 8 Co. 157 a.

(*a*) See *Green v. Rennett*, 1 T. R.

In all these cases, there must be something to amend by. It should also be observed that the word "clerk" imports some officer of the Court coming within that description; and, therefore, the Court refused to allow a plaintiff in replevin, who had pleaded two bad pleas, and after judgment in his favour in this Court and error brought, to withdraw the same and plead *de novo* (b).

*What aided at common law.*] When there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give the verdict, or the jury would have given it; such defect, imperfection, or omission is cured by verdict at common law, or, in the phrase often used upon the occasion, such defect is not a *jeofail* after verdict (c).

Mistakes and defects in proceedings are also often aided by the acts of the opposite party. Thus, where a declaration is defective in point of form, the defect is frequently cured by the defendant in his plea admitting that which was omitted or defectively stated in the declaration; for by admitting it, he waives all objection to the omission or defective statement. This subject shall be noticed in detail in the next section.

*What aided by the statutes of jeofails.*] After verdict, the want of a warrant of attorney, the want of an original writ or bill (d), or any defects in form therein, mistakes and omissions in pleadings, misjoining of issue, miscontinuance, discontinuance, misawarding of jury process, and the omission of a *capiatur* or *misericordia* in a judgment, are aided by the several statutes 32 H. 8, c. 30; 18 El. c. 14; 21 J. 1, c. 13; and 16 & 17 C. 2, c. 8 (e); and the same defects are now aided after judgment by confession, *nil dicit*, or *non sum informatus*, by stat. 4 & 5 A. c. 16, s. 2, "so as there be [an original writ or bill (f) and] warrants of attorney duly filed." Also, all defects in writs, original (f) or judicial, or bills (f), are aided after verdict by stat. 5 G. 1, c. 13. These several statutes shall be more particularly noticed in the next section.

Of these, the statute 32 H. 8, c. 30, extends to penal actions (g); but there is a proviso in the others that they shall not extend to criminal proceedings, nor to any writ, bill, action, or information upon any popular or penal statutes, other than such as concern the customs and subsidies of tonnage and poundage. (See 16 & 17 C. 2, c. 8) (h).

783: *Morse v. James*, Willes, 125.

(b) *Green v. Miller*, 2 B. & Adol. 781.

(c) 1 Saund. 228, 5th ed., and cases there, and 1 Chit. Pl. 5th ed. 710 to 725.

(d) The original writ or bill is now abolished by the 2 W. 4, c. 39, except in ejectment which is founded on original writ or bill, and in actions re-

moved from inferior courts.

(e) See Bul. N. P. 322, 323.

(f) See note (d), *supra*.

(g) *Wynne v. Middleton*, 2 Str. 1227, 1 Wils. 125, S. C.; *Richards v. Brown*, 1 Doug. 115.

(h) *Rez v. Miden*, 1 Str. 62; Cowp. 382; 3 Salk. 130; Hardw. 409.

Although in some of these statutes the Court are directed to amend the defect, yet an actual amendment is never made, but the benefit of the statutes is attained by the Court's overlooking the exception (*k*). And for this reason, if error be brought for any defect aided by these statutes, no costs are given to the plaintiff in error, even although the amendment be made; for the Court might have given judgment on the writ of error without making the amendment, in the same manner as if the amendment had been actually made (*l*).

## SECT. 2.

*Amendment, &c. in particular Cases.*

*Warrant of attorney.*] The want of a warrant of attorney is aided after verdict by 18 *El.* c. 14, (and see 32 *H.* 8, c. 30), although not perhaps after judgment by default. (See 4 & 5 *A.* c. 16) (*m*). If, however, error be brought for want of a warrant of attorney, after judgment by default, the opposite attorney should file his warrant, and have it returned on the *certiorari*. (*Vol.* 1, 349, 360) (*n*).

Also, any mistake or defect which can be attributed to the misprision of the clerks, may be amended even after error brought, by 8 *H.* 6, c. 12. Thus, the Court allowed of amendment in the surname of the attorney, and in the addition, in order to make the warrant correspond with the declaration (*o*).

If a plaintiff under age appear by attorney, in personal actions or ejectment, it is aided after verdict by 21 *J.* 1, c. 13, and after judgment by confession, *nil dicit*, or *non sum informatus*, by 4 & 5 *A.* c. 16, s. 2.

*Original writ or bill.*] When the proceedings by original writ were in existence (*p*), if the original writ were defective, through any misprision of the clerks, it might have been amended; (8 *H.* 6, c. 12) (*q*); if the defect arose from a mere variance between the original and the *præcipe*, caused by the mistake of the cursitor or his clerk, the cursitor would set it right as a matter of course, and reseal the writ (*r*); but if the defect had originated in any other manner, you might have got the writ amended upon petition to the master of the rolls (*s*).

Also, when the proceedings by bill were in existence (*t*), a bill upon

(*k*) 3 Bl. Com. 407.

(*l*) *Condren v. Coulter*, Hardw. 314.

(*m*) See *Bradham v. Taylor*, 1 Wils. 85.

(*n*) And see *Philips v. Smith*, 1 Str. 136.

(*o*) *Richards v. Brown*, 1 Doug. 114.

(*p*) See now the 2 W. 4, c. 39.

(*q*) See *Green v. Miller*, 2 B. & Adol.

781; 8 Co. 159; *King v. The Bishop of Carlisle*, Barnes, 9; *Broune v. Hammond*, Id. 10; *Greenwood v. Richardson*, Id. 16; *Lozgin*, Demandant, *Rawlins*, Tenant, *Pullen*, *Vouchee*, Id. 22.

(*r*) *Smith v. Wilmer*, 3 Atk. 599.

(*s*) See *Carr v. Shaw*, 7 T. R. 299.

(*t*) See now the 2 W. 4, c. 39.



the file might have been amended, at any time before plea pleaded, as of course; or afterwards, upon application to the Court for that purpose. (*R. M. 10 G. 2, r. 2, b*). Thus, a plaintiff was allowed to insert a special memorandum in his bill filed, even after error brought, upon payment of costs (*u*). But the Court refused to allow an amendment to be made in the bill, as to the name of the defendant, after a misnomer pleaded in abatement, where the amendment was not warranted by the process upon which the defendant was brought before the Court (*x*).

Also, every defect in form in an original, the want of pledges or of the sheriff's name being returned on it, or the want of pledges upon a bill, were aided after verdict by *stat. 16 & 17 C. 2, c. 8*, and after judgment by confession or default by *stat. 4 & 5 A. c. 16, s. 2*; and all variance between them and the declaration was aided after verdict by *stat. 21 J. 1, c. 13*; and after judgment by confession or default by *4 & 5 A. c. 16, s. 2*. Also, after verdict, every defect in form or substance in an original writ or bill, and all variance between them and the declaration or other proceedings, were aided by *5 G. 1, c. 13 (y)*. And lastly, the want of an original or bill was aided after verdict by *18 El. c. 14*; but not after judgment by confession or default (*4 A. c. 16, s. 2*), nor after judgment upon demurrer or *nul tiel record*. (*2 Saund. 101 r*).

As to defects in pleas levied in inferior courts, see *Feathers v. Bryan*, 1 *Wils.* 180.

*Process.*] Process is amendable for misprision of the clerks, at any time, by *14 Ed. 3, st. 1, c. 6*; *9 H. 5, st. 1, c. 4*; *8 H. 6, c. 12*; and *8 H. 6, c. 15*; provided there be something to amend by (*z*). Thus, before the recent alteration of process for commencing actions, a *capias ad respondendum* might have been amended in the names, though not in the number, of the parties (*a*), in the teste (*b*), in the return (*c*), and the like. And, in a late case, the Court of Exchequer allowed an amendment of the writ and declaration in an action brought by the assignees of a bankrupt, by adding the name of the official assignee, the defendant not swearing that he had been defending the action on that account (*d*). So, the Court have amended a nonbailable bill of Middlesex, or *latitat*, if any material mistake were made in it; as where it was "to answer the plaintiff in a plea of *debt*," (instead of trespass, with an *ac etiam* in debt), the Court allowed it to be amended (*e*). So, where there was a mistake in the return of a bill

(u) *Dickinson v. Plaisted*, 7 T. R. 474; *Boys v. Edmeads*, 2 Chit. Rep. 22. See *Ruston v. Owston*, 2 Bingh. 469, 10 Moore, 194, S. C.

(x) *Lapiere v. Germain*, 2 Ld. Raym. 859, 2 Salk. 235, 1 Salk. 50, S. C.

(y) See 1 *Saund.* 318.

(z) See *Green v. Rennett*, 1 T. R. 782.

(a) *Carr v. Shaw*, 7 T. R. 299; *Ruth-*

*erford v. Mein*, 2 Smith, 392.

(b) *Bourchier v. Wittle*, 1 H. Bl. 291;

*Davis v. Owen*, 1 B. & P. 342.

(c) *Walker v. Hawkey*, 5 Taunt. 853;

*Adams v. Luck*, 6 Moore, 113, 3 B. & B. 25, S. C.; *infra*, n. (h).

(d) *Baker v. Heaver*, 1 C. & M. 112.

(e) *Cox v. Munday*, 1 W. Bl. 462. See Vol. 1, 111.

of Middlesex, the Court allowed it to be amended (*f*). And it was usual to alter the return of writs, where they were not executed, and get them resealed (*g*); and this, even when writs were stamped, was allowed, provided the writ could have been made returnable as amended, at the time it bore teste (*h*). But if a writ were returnable on a *dies non juridicus*, as in such a case it was altogether void, it could not be amended (*i*). The same principle upon which these cases were decided would still be applicable to a writ of summons, *distringas*, *capias*, or detainer issued under the 2 W. 4, c. 39. The Court may permit an amendment, even after a rule *nisi* obtained to quash the writ (*k*). Amendments in bailable process are not, in general, allowed without discharging bail (*l*).

But, although the Court will thus allow the writ to be amended, they will not allow an amendment of the copy of it after service; for the copy is the act of the party over which the Court have no control (*m*).

If the defendant or his attorney take the declaration out of the office, he thereby waives all irregularities and defects in the process, service of process, or appearance (*n*). Or, if process be merely irregular, the irregularity is waived by the defendant's waiting the expiration of the time for appearance, without taking advantage of the irregularity (*ante*, 783), or by his entering an appearance (*o*); but it has been held that it would not be waived by the plaintiff's entering an appearance for him (*p*). So, such irregularity is waived by obtaining time to put in bail, &c. (*Ante*, 738).

After verdict, every defect in a judicial writ, in substance or in form, or variance between it and the declaration or other proceedings, is aided by 5 G. 1, c. 13. So, miscontinuance, discontinuance, or misconveyance of process, is aided after verdict by 32 H. 8, c. 30, and even in penal actions, after judgment by confession or default, by 4 & 5 A. c. 16, s. 2 (*q*).

It may, perhaps, be necessary to add, that defects in mesne process can never be the subject of a writ of error.

*Appearance.*] Where the plaintiff's attorney by mistake entered an appearance for the defendant by a wrong name, the Court, upon application, ordered the filacer to amend the appearance, the defendant being correctly named in the writ (*r*).

The Court have refused to amend the bail-piece in a bailable action, unless with the consent of the bail (*s*); and the Court of Com-

(*f*) *Reubel v. Preston*, 5 East, 291; and see *Green v. Rennett*, 1 T. R. 782; *supra*, 836, n. (c).

(*g*) *Israel v. Middleton*, 1 Chit. Rep. 321, 308.

(*h*) *Durdon v. Hammond*, 2 D. & R. 211, 1 B. & C. 111, S. C.

(*i*) *Kenworthy v. Peppiatt*, 4 B. & Ald. 288.

(*k*) *Walker v. Hawkey*, 5 Taunt. 853; *Adams v. Luck*, 6 Moore, 113, 3 B. & B. 25, S. C.

(*l*) *Inman v. Huish*, 2 N. R. 133; *Marsh v. Blackford*, 1 Chit. Rep. 323; *Bradshaw v. Davis*, Id. 374; *ante*, Vol. 1, 103, 111; *Hutchinson v. Hyde*, Oct. 10,

1828, Chit. Sum. Prac. 29.

(*m*) *Byfield v. Street*, 10 Bingh. 27.

(*n*) *Caswall v. Martin*, 2 Str. 1072; *Morgan v. Luckup*, Hardw. 242; *ante*, 783.

(*o*) *Doe v. Butcher*, 3 T. R. 611; *Catten v. Barwick*, 1 Str. 155; *Hole v. Finch*, 2 Wils. 313.

(*p*) *Doe v. Butcher*, 3 T. R. 611; *Westall v. Finch*, Barnes, 406.

(*q*) *Humble v. Bland*, 6 T. R. 255.

(*r*) *Wheston v. Puckman*, 3 Wils. 49. See *Goodright v. Wright*, 1 Str. 33; *Stratton v. Hurgis*, Id. 114; *Power v. Jones*, Id. 445.

(*s*) 1 Barnard. 214.

mon Pleas have refused it, upon the application of the bail to the sheriff, after an action against them upon the bail bond and *comperuit ad diem* pleaded (*t*). That Court have also refused to allow an amendment of the sum in the bail-piece in error, even with the consent of the bail, the effect of the amendment being merely that, if allowed, the writ of error would be a *supersedeas* of execution (*u*).

The Court of Common Pleas have also ordered the recognizance of bail to be amended, where the application was made on the part of the bail (*x*); but they have refused to do so, where the bail had not assented to it (*y*).

As to when a defect in the appearance is waived, see *ante*, 783.

*Declaration.*<sup>1</sup> The declaration may be amended, at common law, in the title (*z*), in the venue, (*ante*, 783), in the parties' names (*a*), and in the body of the declaration, in form (*b*), or substance (*c*). And this amendment will be allowed even in penal actions (*ante*, 832), or in an action against the marshal for an escape (*d*), provided the amendment do not introduce any new substantive cause of action, or new charge against the defendant (*e*). But in other actions, (provided the bail be not prejudiced), the Court will allow the plaintiff to add even a new count, upon payment of costs (*f*); and this even after two terms, provided the counts intended to be added contain no new causes of action (*g*). And the Court of Common Pleas have, under particular circumstances, allowed the plaintiff to amend his declaration, by changing it from *assumpsit* into debt even after six terms from the return of the writ (*h*). And in a late case, where the plaintiff declared in trespass, instead of case, for an injury occasioned by the negligent driving of the defendant's servant, this Court allowed the plaintiff to amend the declaration into case, notwithstanding the application was not made until after two terms from the return of the writ (*i*). But in a later case, where the plaintiff commenced his action in Hilary Term, 1831, and declared in trover; the parties went to issue, and the plaintiff was put under a peremptory undertaking to try; in Michaelmas Term, 1832, having been advised that the action was mis-

(*t*) *Bingham v. Dickie*, 5 Taunt. 814; but see *Anderson v. Noah*, 1 B. & P. 37.

(*u*) *Reel v. Cooper*, 5 Taunt. 320.

(*x*) *Hulliday v. Fitzpatrick*, 4 Taunt. 875.

(*y*) *Tabrum v. Tenant*, 1 B. & R. 481; *Faget v. Vanthienen*, Barnes, 59; *Venn v. Warner*, 3 Taunt. 263; but see *Mann v. Calow*, 1 Taunt. 221.

(*z*) *Coutanche v. Le Ruez*, 1 East, 133; *Symonds v. Parmenter*, 1 Wils. 78; *Stork v. Herbert*, Id. 242; *Wilkes v. Earl of Halifax*, 2 Wils. 256; *Brazier v. Jones*, 6 B. & C. 196.

(*a*) See *Smith v. Fuller*, 1 Ld. Raym. 116.

(*b*) *Marshall v. Riggs*, 2 Str. 1162; *Stroud v. Tilly*, Id.

(*c*) *Bondfield v. Milner*, 2 Bur. 1096; *Havers v. Bannister*, 1 Wils. 7.

(*d*) *Barnes v. Eyles*, 2 Moore, 561, 8 Taunt. 515, S. C.; *Brazier v. Jones*, 6 B. & C. 196.

(*e*) *Cross v. Kaye*, 6 T. R. 544; *Maddock v. Hammett*, 7 T. R. 55. See *Woodroffe v. Williams*, 6 Taunt. 19; *Horston v. Shilliter*, 6 Moore, 490; *Sweeting v. Halse*, 4 M. & R. 383; *Morris v. Evans*, 1 Dowl. P. C. 657.

(*f*) *Doe d. Beaumont v. Armitage*, 1 D. & R. 173; *Tidd*, 644. See *Erectors of the Duke of Marlborough v. Widdmore*, 2 Str. 690; *Brown v. Crump*, 6 Taunt. 300.

(*g*) MS. E. 1820.

(*h*) *Billing v. Flight*, 6 Taunt. 419; *Billing v. Pooley*, Id. 422; and see *Atkinson v. Bell*, 2 M. & R. 292, 302, 8 B. & C. 277, S. C.

(*i*) MS.; also another MS. M. T. 1828.

conceived, he moved for leave to substitute a count in *detinue* for that in *trover*, and add one in *debt*, and it was sworn that no new ground of action was contemplated; the Court refused the application (i).

Also, where a jury gave more damages than were laid in the declaration, the Court, upon application of the plaintiff, granted a new trial, and gave him leave to amend the declaration by increasing the damages (j). But where a verdict was taken for the damages laid in the declaration, subject to an award, the Court refused to allow the plaintiff to amend his declaration by increasing the damages, although it appeared from the affidavit that a larger sum would probably be proved before the arbitrator (k). The Court have entertained the application for an amendment in these respects, even after a plea in abatement for the mistake sought to be amended (l), or after issue joined (m), or the record taken down for trial and withdrawn (n), and even after verdict, under particular circumstances (o). They have allowed it also after issue joined on *nul tiel record* (p); they have also set aside a nonsuit, and allowed the declaration to be amended as to the error for which the plaintiff was nonsuit (q); and have set aside a verdict for plaintiff, upon his application, and amended the declaration by increasing the damages (r).

As to the amendment of a declaration in *ejectment*, see *ante*, 535, 536.

Before plea, the declaration may be amended without costs, excepting the costs of the application; after a general issue and before entry, if amended in substance, the plaintiff must pay costs; or if amended in form, it may be without payment of costs; but after a special plea or demurrer, it can in general be amended only upon the terms of paying costs. (*R. M.* 10 G. 2, b; and see *R. M.* 1654, s. 13).

If there be any defect in the declaration arising from the misprision of the clerks, it may be amended at any time, by leave of the Court. (8 H. 6, c. 12) (s). When the proceedings by bill existed, the declaration might have been amended by the bill on the file; and for this purpose the Court would, if necessary, allow a new bill to be filed in order to amend (t).

Having stated what defects in a declaration are amendable, we shall now see what are aided, either at common law, or under the statutes of *jeofails* (u). A declaration is aided at common law, after

- (i) *Green v. Mitton*, 4 B. & Adol. 369.
- (j) *Tomlinson v. Blacksmith*, 7 T. R. 132; and see 2 Chit. Rep. 27, (h).
- (k) *Pearse v. Cameron*, 1 M. & Sel. 675.
- (l) *Garner v. Anderson*, 1 Str. 11; *Mestaer v. Hertz*, 3 M. & Sel. 450; *Owens v. Dubois*, 7 T. R. 698.
- (m) *Executors of the Duke of Marlborough v. Widmore*, 2 Str. 890.
- (n) *Mace v. Lovett*, 5 Bur. 2833; *Cross v. Kaye*, 6 T. R. 543; *Morris v. Evans*, 1 Dowl. P. C. 657; *ante*, 831.
- (o) *Wilder v. Handy*, 2 Str. 1151; *Smith v. Fuller*, 1 Ld. Raym. 116; see *Marrint v. Lister*, 2 Wils. 147; *Vicars v. Huydon*, 2 Cowp. 841.
- (p) *Symonds v. Parmenter*, 1 Wils. 87; *Blackmore v. Fleming*, 7 T. R. 447.
- (d) *Doubleday v. —* 2 Chit. Rep. 27.
- (q) *Williams v. Pratt*, 5 B. & Ald. 896; *Halhead v. Abrahams*, 3 Taunt. 81; *Dartnall v. Howard*, Chit. Sum. Prac. 149.
- (r) *Tomlinson v. Blacksmith*, 7 T. R. 132.
- (s) See 1 Doug. 116; *Moody v. Stracey*, 4 Taunt. 588.
- (t) *Russel v. Martin*, 1 Str. 583; *Marshall v. Riggs*, 2 Id. 1162.
- (u) See fully, 1 Chit. Pl. 5th ed. 710 to 725.

*verdict*, where there is any defect, imperfection or omission in it, whether in substance or in form, for which the defendant might have demurred, but the facts so defectively stated or omitted are such as must necessarily have been proved at the trial in order to entitle the party to the verdict he obtained. (*Ante*, 834). Thus (where before *stat. 4 & 5 A. c. 16, s. 9*, which rendered attornment unnecessary) an action was brought for rent by the bargainee of a reversion, and the declaration omitted to allege attornment of the tenant, and upon *nil debet* pleaded there was a verdict for the plaintiff, the omission was holden to be cured by verdict (*x*); but it would have been a fatal objection after judgment by default (*y*). So, if the grant of a reversion or incorporeal hereditament be pleaded, and it is not alleged to have been by deed, or a feoffment be pleaded without livery, yet if the grant or feoffment be put in issue and found by the jury, the omission is cured by the verdict (*z*); but it would be fatal after judgment by default. So, in an action for a malicious prosecution, if the declaration do not allege that the prosecution is at an end, it is fatal upon demurrer or after judgment by default (*a*), but is cured by verdict (*b*). So, an ambiguous expression in a declaration, is cured by verdict, and must afterwards be taken to have been used in that sense which would sustain the verdict (*c*). But if the plaintiff, in his declaration, either state a defective title, or totally omit to state any title or cause of action whatever, a verdict will not cure the defect, either at common law or under the statutes of jeofails (*d*). Thus, in an action on a bill of exchange against the indorser, where a demand upon and refusal by the acceptor was not alleged in the declaration, the omission was holden not to be cured by verdict (*e*). So, in an action against an heir upon the bond of his ancestor, if the declaration omit to state that the ancestor in his bond bound himself and his heirs, the omission is not cured by verdict (*f*). Surplusage, however, does not vitiate, after verdict (*g*).

The following defects in a declaration are cured after verdict by the statutes of jeofails, and after judgment by confession or default by 4 & 5 A. c. 16, s. 2; mispleading, insufficient pleading or jeofail, or other default or negligence of the parties, their counsellors or attornies; (32 H. 8, c. 30); lack of averment of any life, so as the person be proved to be alive; (21 J. 1, c. 13); want of form in any count, declaration, plaint, bill, suit, or demand; (18 El. c. 14) (*h*); want of profert, or the omission of *vi et armis* (*i*), or *contra pacem*; mistaking the christian name or surname of either party, sums, day,

(*r*) *Hitchen v. Stevens*, 2 Show. 233; *Rushton v. Aspinall*, 2 Doug. 683; 2 Saund. 305 *a*, (n. 13).

(*y*) *Vandeput v. Lord*, 1 Str. 78.

(*z*) *Hut. 54*; *Spieres v. Parker*, 1 T. R. 145.

(*a*) *Waterer v. Freeman*, Hob. 267; *Parker v. Langley*, 10 Mod. 209; 1 Doug. 205; *Morgan v. Hughes*, 2 T. R. 225. See 5 Price, 540; *Pippet v. Hearn*, 5 B. & Ald. 634.

(*b*) 1 Saund. 228 *c*.

(*c*) *Lord Huntingtower v. Gardiner*,

1 B. & C. 304, 2 D. & R. 450, S. C.

(*d*) *Rushton v. Aspinall*, 2 Doug. 683, 658, 628, *n.*; *Small v. Cole*, 2 Bur. 1159; *Weston v. Matson*, 3 Id. 1728; *Roe d. Wrangham v. Hersey*, 3 Wils. 275; *Spieres v. Parker*, 1 T. R. 141—146; *Bishop v. Hayward*, 4 T. R. 472.

(*e*) *Rushton v. Aspinall*, 2 Doug. 679.

(*f*) 2 Saund. 136, 137 *a*.

(*g*) *Bul. N. P. 321*; *Cro. Jac. 94*.

(*h*) See — *v. Lee*, 1 Ld. Raym. 211.

(*i*) *Parker v. Bailey*, 4 D. & R. 215.

month, or year, in any bill, declaration, or pleading, being right in the writ, plaint, roll, or record preceding, or in the same roll or record wherein the same is committed, to which the party might have demurred and shewn the same for cause, the want of *prout patet per recordum*; or the want of a right venue, so as the cause were tried by a jury of the proper county where the action is laid (and which is holden to aid the defect of a mistrial of a local action in a wrong county (*k*)); or any other matters of the like nature, not being against the right of the matter in suit, nor whereby the issue or trial are altered. (16 & 17 C. 2, c. 8) (*l*). But in no case is a declaration aided by these statutes, where the plaintiff either states a defective title, or totally omits to state any title or cause of action in it. (*Supra*). A variance in point of form, between the declaration and the original or bill, is aided after verdict by 21 J. 1, c. 13; and after judgment by confession or default, by 4 A. c. 16, s. 2. Also, after verdict, all variance between the declaration and the original or bill, whether in form or in substance, is aided by 5 G. 1, c. 13.

As to the time for pleading after an amendment of the declaration, see Vol. 1, 196. A declaration in ejectment, as we have seen, (*ante*, 535, 536), may be amended as well after as before plea pleaded, in the same manner as declarations in other actions.

*Particulars of demand.*] If a bill of particulars be incorrect, the party who delivered it may have leave to amend it; or, if not sufficiently explicit, the party may take out a summons and obtain an order for further particulars. (*Ante*, 776).

*Plea, replication, &c.*] Pleas, replications, and subsequent pleadings, may be amended at common law, whilst they are in paper, by leave of the Court, upon payment of costs. (*Ante*, 832) (*m*). They have allowed a plea of a judgment by an executor to be amended in the sum for which the judgment was recovered, although the application was not made until nearly three years after issue joined (*n*). They have allowed a replication to be amended, after the cause had been carried down to trial and made a *remanet* (*o*); and where a replication to a sham plea was defective, the plaintiff had leave to amend, without payment of costs, after demurrer argued (*p*). Even after verdict, the Court have allowed of an amendment, by inserting the *similiter* after the replication, instead of an “&c.” (*q*); and in a recent case in the Court of Common Pleas, where the plaintiff had omitted to reply to one of the defendant's pleas, and the defendant

(*k*) *Mayor, &c., of London v. Cole*, 7 T. R. 583; *Maitland v. Taylor*, 2 Ld. Raym. 1212; *Bailiffs and Citizens of Litchfield v. Slater*, Willes, 431; and see *Meller v. Barber*, 3 T. R. 337; 1 Saund. 247.

(*l*) See 1 Saund. 247 *a*, and the cases there cited; also 1 Saund. 241 *b*, 228 *a*; 2 Saund. 7 *a*.

(*m*) *Low v. Newland*, 1 Wils. 76.

(*n*) *Skutt v. Woodward*, 1 H. Bl. 238; and see *Prior v. Duke of Buckingham*, 8 Moore, 584; *Oldershaw v. Thompson*, 1 Stark. Rep. 312.

(*o*) *Cope v. Marshall*, Say. 285.

(*p*) *Solomons v. Lyon*, 1 East, 369; *Heydon v. Thompson*, MS. K. B. 9 Nov. 1833.

(*q*) *Sayer v. Pocock*, Cowp. 407.

added the *similiter* as if the plaintiff had replied, the Court allowed the plaintiff to amend by inserting the replication, after verdict, upon payment of costs of the application, the merits of the case having been tried upon the other issues (r). The Court, however, have refused to allow a replication to be amended after a nonsuit (s); and after a verdict set aside, in an action against an executor (t). Nor will the Court in general allow the replication to be amended, in hard actions, particularly after demurrer argued; and, on the other hand, they will not amend a plea in abatement (u). In a late case in the C. P., the general issue having been pleaded to an action for an assault, and a verdict found for plaintiff, and a new trial granted on payment of costs, the Court would not allow the defendant to withdraw the general issue and plead accord and satisfaction (x).

As to withdrawing pleas or replications, and pleading or replying *de novo*, see Vol. 1, 210.

Also, the pleadings may be amended at any time, as to defects, which, in the opinion of the Court, have originated from the misprision of the clerks. (8 H. 6, c. 12) (y). They may be amended by the draft under counsel's hand (z), or by the paper book (a).

Pleas, replications, &c. are aided, at common law, after verdict for the party who pleaded them, in the same cases as declarations, namely, where the matter defectively stated or omitted (not amounting to a defective title or the omission of title,) is such as must necessarily have been proved at the trial, in order to entitle the party pleading to the verdict he has obtained. (See *ante*, 834) (b). But where there is a defect, omission, or imperfection, though in form only, in some collateral parts of the pleading that were not in issue between the parties, so that there can be no room to presume that the defect or omission has been supplied by proof, a verdict will not cure it at common law (c), although in some cases it would under the statutes of jeofails. Thus, where a replication should have averred that the cattle were *levant et couchant* on the plaintiff's land, and issue was taken on a prescription only, a verdict in favour of the prescription was holden not to aid the omission of this averment, at common law (d); although it would now be aided by the statutes of jeofails. Also, where a plea confesses the action, but does not sufficiently avoid it, the plaintiff, we have seen, (*ante*, 829), may move for judgment *non obstante veredicto*.

In pleas, replications, &c. the following defects are aided after verdict by the statutes of jeofails, and after judgment by confession

(r) *Cooke v. Burke*, 5 Taunt. 164; and see the cases, *post*, 844, n. (m).

(s) *Hutchinson v. Brice*, 5 Bur. 2692.

(t) *The Bank of England v. Morris*, 2 Str. 1002.

(u) Pr. Reg. 21; 1 Sellon, 275. See *ante*, 832, 479.

(x) *Price v. Severn*, 7 Bmgh. 402, 5 M. & P. 250, 1 Dowl. P. C. 215, S. C.

(y) *Green v. Miller*, 2 B. & Adol. 782.

(z) *Hatton v. Walker*, 2 Str. 846; *Ramsey v. Bird*, Cro. El. 258.

(a) 8 Co. 161 b; *Parsons v. Gill*, 1 Salk. 50, 88, 2 Ld. Raym. 895, S. C.; Tidd, 651.

(b) Bul. N. P. 321; 1 Chit. Pl. 5th ed. 710 to 725.

(c) 1 Saund 228 a.

(d) *France v. Tringer*, Cro. Jac. 44.

or default, by 4 & 5 A. c. 16, s. 2: mispleading, lack of colour, insufficient pleading or jeofail, or other default or negligence of the parties, their counsellors or attornies; (32 H. 8, c. 30); lack of averment of any life, so as the person be proved to be alive; (21 J. 1, c. 13); want of profert, or mistaking the christian name or surname of either party, sums, day, month, or year, in any pleading, being right in any writ, plaint, roll, or record preceding, or in the same roll or record wherein the same is committed, to which the other party might have demurred, and have shewn the same for cause; want of the averment of "*hoc paratus est verificare*," or of "*hoc paratus est verificare per recordum*," or for, not alleging "*prout patet per recordum*," or any other matters of the like nature, not being against the right of the matter of the suit, nor whereby the issue or trial are altered. (16 & 17 C. 2, c. 8).

*Notice of set-off, &c.*] The Court of Common Pleas have refused to allow a notice of set-off to be amended (e); it may be doubted, however, if this Court would not allow of the amendment in all cases where they would allow of a plea of set-off to be amended; at all events they would in such cases allow the plaintiff to withdraw his general issue, and plead it again with a new notice of set-off, as mentioned Vol. 1, 210.

Even after a trial the Court granted a new trial, and gave the defendant leave to plead *de novo*, with a proper notice of his intention to dispute the act of bankruptcy, &c. the former notice having been too general (f).

*Demurrer.*] A demurrer cannot be amended without the consent of the opposite party (g).

*Writ of inquiry.*] Defects or errors in a writ of inquiry may be amended by the award of it on the roll (h). Where the writ and inquisition were lost, the Court ordered new ones to be made out according to the sheriff's notes, and that the costs before taxed should be indorsed by the master (i). The want of a writ of inquiry, however, is said to be aided by the statutes of jeofails (j).

*Issuc.*] The misjoining of issue, or an issue otherwise informal, is aided after verdict by 32 H. 8, c. 30 (k); so are miscontinuance and discontinuance, by 32 H. 8, c. 30. (See Vol. 1, 349) (l). The want of a *similiter* is also aided by it, or is at least amendable under

(e) *Anon.* Barnes, 294.

(f) 6 B. & C. 537, n.; and see the cases, *ante*, 684.

(g) *Maynard v. Hopkins*, Say. 46.

(h) *Johnson v. Toulmin*, 4 East, 173; *Conden v. Coulter*, Hardw. 314; *Hughes v. Alvarez*, 1 Str. 684; *Ingham v. Chishull*, Barnes, 15; *ante*, 513.

(i) *Bean v. Elton*, 2 Str. 1077.

(j) *Iles v. Pitt*, 2 Ld. Raym. 1397; *Mallory v. Jennings*, 2 Str. 878. See *ante*, 511, 512.

(k) *Payne v. Buskin*, 1 Stark. 74.

(l) 2 Saund. 319; Bul. N. P. 321; *Cary v. Hinton*, 2 Str. 973.

(i) *Humble v. Bland*, 6 T. R. 255; 2 Saund. 1 e.



*stat. 8 H. 6, c. 12 (m)*; and even where the plaintiff added the *similiter* to a rejoinder concluding with a verification, instead of taking issue and concluding to the country, the Court allowed the record to be amended after verdict (*n*). (*Ante*, 841). Also, if the *similiter* be added in the name of the defendant, instead of the plaintiff, or the contrary, it is aided after verdict by the above statute (*o*), or may be amended (*p*).

If the issue vary from the declaration or other pleading, accepting the issue will be a waiver of all objection on that account. (*Ante*, 784, *Vol. 1*, 220). If it vary from the record of *nisi prius*, the objection should be made at the trial, otherwise the Court will deem it aided by verdict, or will amend the *nisi prius* record by the roll (*r*); and if in such case, the *nisi prius* record agree with the declaration delivered, a variance between it and the issue is not material, even although the objection be made at the trial (*s*).

An immaterial issue is not aided either at common law or by statute (*t*); but the Court in such a case usually grant a replender. See, upon this subject, 2 *Saund.* 319 *b*; *Staple v. Hayden*, 2 *Salk.* 579, 2 *Ld. Raym.* 922, *S. C.*

The Court, we have seen, will allow the issue roll to be amended, even after verdict, if the amendment do not alter the substance of the issues between the parties. (*Ante*, 841) (*u*). They would also, when the proceedings by bill existed, allow of an amendment, by the insertion of a special memorandum of the term in which plaintiff filed his bill, even after error brought. (*Ante*, 836). And where there was a mistake in the title of the issue, the Court allowed the plaintiff to deliver a new issue properly intituled (*v*).

*Jury process.*] The Court may amend the jury process, at any time, for defects arising from the misprision of the clerks, by 8 *H. 6, c. 12 (x)*. The *distringas* may be amended by the *venire*; and the *venire*, by the award of it on the roll.

If jury process be awarded to a wrong officer, upon an insufficient suggestion; or if the *visue* be in some part misawarded, or sued out of more or fewer places than it ought to be, so as some one place be rightly named; or if any of the jury who tried the issue be misnamed either in the surname (*y*) (*Vol. 1*, 294) or addition, in the jury process or return thereto, so as it be proved that it was the

(*m*) *Sayer v. Pocock*, *Cowp.* 407; *Reeder v. Bloom*, 2 *Bingh.* 384, 9 *Moore*, 741, *S. C.*; *Wright v. Horton*, 1 *Stark.* 400, 2 *Chit.* 25, 6 *M. & Sel.* 50, *S. C.* See also *Griffith v. Crookford*, 3 *B. & B.* 1, 6 *Moore*, 51, *S. C.*; *Ferrers v. Weal*, 2 *Moore*, 21.

(*n*) *Grundy v. Mell*, 1 *New Rep.* 28; and see *Cooke v. Burke*, 5 *Taunt.* 164.

(*o*) *Rawbone v. Hickman*, 1 *Str.* 551; *Harvey v. Peake*, 3 *Bur.* 1793; *Birton v. Mandel*, *Cro. Jac.* 67; *Bul. N. P.* 320.

(*p*) *Greenwood v. Piggott*, 3 *Salk.* 31.

(*q*) *Leenan v. Allen*, 2 *Wils.* 160.

(*s*) *Shepley v. Marsh*, 2 *Str.* 1131; *post*, 845, *n. (z)*.

(*t*) *Bul. N. P.* 321.

(*u*) *Sayer v. Pocock*, *Cowp.* 407; *Grundy v. Mell*, 1 *New Rep.* 28; *Cooke v. Burke*, 5 *Taunt.* 164.

(*v*) *Beaumont v. Stewart*, *Barnes*, 18.

(*x*) See *Bullock v. Parsons*, 2 *Salk.* 454, 2 *Ld. Raym.* 1143, *S. C.*; *Rez v. Roberts*, 2 *Str.* 1214; *Philips v. Smith*, 1 *Id.* 136.

(*y*) See *Hill v. Yates*, 12 *East*, 229.

same man who was meant to be returned; or if there be no return to the said process, so as the panel of the jurors' names be returned and annexed to it; (see 6 G. 4, c. 50, s. 15, Vol. 1, 260); or if the returning officer's name be not to the return, so as it be proved that the writ was returned by the returning officer; all these several defects are aided after verdict by 21 J. 1, c. 13 (z). Also, by 5 G. 1, c. 13, every defect or fault in judicial writs, and every variance between them and the other proceedings, is aided after verdict; and as this statute relates to judicial writs generally, it seemingly includes jury process (a). And lastly, the want of a *venire* is aided after verdict (b).

*Nisi prius record.*] The Court may amend the record of *nisi prius* at any time, for a defect arising from misprision of the clerks. (8 H. 6, c. 12; 8 H. 6, c. 15) (c). It may be amended by the issue roll (d). Where the issue in ejectment was against seven defendants, and the *nisi prius* record, by mistake, against five only, the Court amended the *nisi prius* record, after verdict, by adding the names of the remaining two defendants (e). But where the mistake was in the *jurata*, the day of *nisi prius* therein not having been altered after the cause was made a *remanet*, and the subsequent trial appeared of course to have been had after the day of *nisi prius*, the Court of Common Pleas held the trial to be *coram non judice*, and refused to amend the *jurata* and *distringas*, but awarded a *venire de novo* (f). For variance between the *nisi prius* record and the issue, the objection must be made at the time of the trial, for the Court will not in general set aside the verdict for such a cause (g); and a variance in this respect is wholly immaterial, if the *nisi prius* record agree with the declaration delivered (h). Where the record and *postea* were lost, the Court ordered a new one to be made out from the issue roll and from the associate's notes (i).

Even before the recent acts (*ante*, 831), the record might be amended by leave of the Judge at *nisi prius*, and this even after the cause was called on, provided it was before the jury were sworn (j), provided also the alteration proposed were not matter of material allegation (k), and the attorney was not aware of the defect in time to have it remedied upon application to a Judge at chambers. Formerly, it could be amended only by a Judge of the Court wherein the

(z) See *Gurney v. Clere*, Cro. El. 259; *Welsh v. Upton*, Id.; *Elliott v. Skipp*, Cro. Car. 338; Bul. N. P. 320, 324.

(a) See *Waldo v. Harrison*, Barnes, 5; *Gurney v. Clere*, Cro. El. 259; *Welsh v. Upton*, Id.; Bul. N. P. 320.

(c) See *Halhead v. Abrahams*, 3 Taunt. 81.

(d) *Child v. Harvey*, 1 Salk. 48, 1 Ld. Raym. 511, S. C.

(e) *Bishop of Worcester's case*, 1 Ld. Raym. 94, 1 Salk. 48, S. C.

(f) *Crouder v. Rooke*, 2 Wils. 144. See *Child v. Harvey*, 1 Salk. 48, 1 Ld. Raym. 511, S. C.; but see *Waldo v.*

*Harrison*, Barnes, 5.

(g) *Doe d. Cotterill v. Wylde*, 2 B. & Ald. 472; *Leeman v. Allon*, 2 Wils. 160; *Jones v. Tatham*, 8 Taunt. 634; but see *Wreathock v. Bingham*, Barnes, 476; *Cooper v. Spencer*, 1 Str. 641, 8 Mod. 376, S. C.; *Drummond v. Birt*, 2 M. & M. 136.

(h) *Shepley v. Marsh*, 2 Str. 1131.

(i) *Dayrell v. Bridge*, 2 Str. 1264.

(j) *Doe d. Manning v. Hay*, 1 M. & Rob. 243; *Drummond v. Birt*, 2 M. & M. 136.

(k) *Paine v. Bustin*, 1 Stark. 74.

record was made up (*l*); but now it may be amended, on circuit, by the Judge who is to try the cause, in the same manner as if he were a Judge of the Court where the action is pending. (See 1 *G. 4*, c. 55, ss. 5, 6; *Vol. 1*, 62). And by the 9 *G. 4*, c. 15, and 3 & 4 *W. 4*, c. 42, s. 23, the Judge at *nisi prius* may, pending the trial, allow the *nisi prius* record to be amended on a variance between matters as stated in the record and those proved in evidence. (*Ante*, *Vol. 1*, 282, and *ante*, 831).

*Verdict.*] The Court have in general no authority to amend or alter the verdict actually found by the jury, in point of substance (*m*). The only exception to this is, in the case of mayhem, where the Court, upon inspection of the plaintiff, may increase the damages given by the jury. (*Vol. 1*, 313). But the Court have refused to do this in other actions, even where the jurymen joined in an affidavit, stating their intention to have given such increased damages, and that they conceived their verdict was calculated to give them (*n*). The proper time for explanations of this kind is at the trial (*o*).

But when a mistake is made in recording the verdict, the Court may amend it by the Judge's notes (*p*), or by the notes of the clerk of assize or associate (*q*), at any time before judgment by the common law (*r*), or after final judgment, and even after error brought (*s*), the mistake in such a case arising from the misprision of the clerk. Thus, when the associate, imagining the action to be debt instead of covenant, entered 1*l.* damages instead of 174*l.*, the Court allowed it to be amended by the Judge's notes (*t*); and the same, where the associate marked wrong damages (*u*). So, where the defendant pleaded the general issue and the statute of limitations, and a verdict was found for the plaintiff on the first issue, but no notice taken of the last; the Court allowed it to be amended, even after error for this defect, and joinder in error, on payment of costs (*x*). So, where there were several counts in a declaration, some of which were bad, and by mistake a general verdict on all the counts was entered, although evidence had been given upon the good counts only; the Judge who tried the cause, or if he refused it the Court, may allow the *postea* to be amended by the Judge's notes (*y*). And where, in such a case, it appeared from the Judge's notes that the jury calculated the damages on evidence applicable to the good counts only,

(*l*) See *Halhead v. Abrahams*, 3 Taunt. 81.

(*m*) See *Spencer v. Goter*, 1 H. Bl. 78; *Sandford v. Porter*, MS. H. 1620.

(*n*) *Jackson v. Williamson*, 2 T. R. 281.

(*o*) *Id.*

(*p*) *Newcombe v. Green*, 2 Str. 1197, 1 Wils. 33, S. C.; *Doe d. Church v. Perkins*, 3 T. R. 749; *Richardson v. Melish*, 11 Moore, 104, 7 B. & C. 819, 3 Bingh. 334, S. C.

(*q*) *Rex v. Keat*, 1 Salk. 47; *Parsons v. Gill*, Id. 51, 2 Ld. Raym. 895, S. C.;

*Sandford v. Porter*, 2 Chit. Rep. 352.

(*r*) *Grant v. Astle*, 2 Doug. 730.

(*s*) *Petrie v. Hannay*, 3 T. R. 749, 659; *Usher v. Dansey*, 4 M. & Sel. 94; MS. E. 1815.

(*t*) *Bul. N. P.* 320.

(*u*) *Newcomb v. Green*, 1 Wils. 33, 2 Stra. 1197, S. C.

(*x*) *Petrie v. Hannay*, 3 T. R. 659.

(*y*) *Eddowes v. Hopkins*, 1 Doug. 376; and see *Taylor v. Whitehead*, 2 Id. 746; *Henley v. The Mayor and Corporation of Lyme Regis*, 3 M. & P. 310, 6 Bingh. 100, S. C.

the Court amended the *postea*, although it appeared that evidence had been given applicable to the bad counts also (z). (*Vol.* 1, 310). The Court, however, have refused to entertain an application for entering the verdict upon particular counts, according to the evidence on the Judge's notes, after a lapse of eight years, and after judgment had been reversed on error brought for a defect in one of the counts (a). And in a penal action, where the jury found a verdict for one penalty, on evidence equally applicable to each of two counts, and the plaintiff applied it to one of the counts which was subsequently found to be bad, the Court would not afterwards allow him to enter it upon the other (b). After verdict in ejectment for a messuage and tenement, the Court (pending a rule to arrest the judgment) gave leave to amend, by entering the verdict for the messuage only, without obliging the lessor of the plaintiff to release the damages (c).

The party also may, in some cases, by his own act, remedy the mistake of the jury in giving their verdict. Thus, in a joint action against two, if the jury sever the damages by mistake, the plaintiff may cure the defect by taking judgment *de melioribus damnis* against one, and entering a *nolle prosequi* as to the other (d); or, by entering a *remittitur* as to the lesser damages, he may have judgment for the greater damages against both (e). Or, if the jury give greater damages than are laid in the declaration, the Court, even after judgment, and error brought on that account, will allow the plaintiff to remedy the defect by entering a *remittitur* for the excess (f). So, if the jury in replevin find according to stat. 17 C. 2, c. 7, s. 2, but, instead of finding the amount of the rent in arrear and the value of the goods distrained, find damages to the amount of the rent claimed in the consuance, the defendant may remedy the defect by obtaining leave of the Court to enter his judgment for a return as at common law, or the Court will allow him to amend his judgment if already entered as according to stat. 17 C. 2, c. 7, s. 2 (g). (*Ante*, 592).

A special verdict may be amended by the Judge's notes (h), by the minutes taken by the clerk of assize or associate (i), by the notes of counsel, or even by an affidavit of what was proved at the trial (k). So, if a special case be misstated, the parties may have leave to

(z) *Williams v. Breedon*, 1 B. & P. 329, and MS. Exchequer, T. T. 1832.

(a) *Harrison v. King*, 1 B. & Ald. 161.

(b) *Holloway v. Bennett*, 3 T. R. 448.

(c) *Goodtitle v. Otway*, 8 East, 357; and see *Doe v. Dyball*, 1 M. & P. 330, 8 B. & C. 70, S. C.

(d) *Rodney v. Strobe*, Carth. 19; *Mitchell v. Millbank*, 6 T. R. 199; *Dale v. Eyre*, 1 Wils. 306; *ante*, Vol. 1, 309.

(e) *Johns v. Dodsworth*, Cro. Car. 192; *Sabin v. Long*, 1 Wils. 30.

(f) *Usher v. Dansey*, 4 M. & Sel. 94; MS. E. 1815; *Pickwood v. Wright*, 1 H.

Bl. 643.

(g) *Rees v. Morgan*, 3 T. R. 349; *Carth.* 362; *Sheupe v. Crilpeper*, 1 Lev. 255; and see *Gamon v. Jones*, 4 T. R. 509.

(h) *Manners v. Postan*, 3 B. & P. 343.

(i) *Rex v. Kent*, 1 Salk. 47; Bul. N. P. 320; *Sandford v. Porter*, 2 Chit. Rep. 352.

(k) *Mayo v. Archer*, 1 Str. 514. See *Cromwell v. Grunsden*, 2 Salk. 462, 1 Ld. Raym. 335, S. C.; *Trevivan v. Lawrence*, 1 Salk. 276, 3 Id. 151, 2 Ld. Raym. 1036, S. C.

amend it. (*Vol. 1, 306*) (*l*). For what defects in a verdict the Court will award a *venire de novo*, see *ante*, 829.

Where the record of *nisi prius*, with the *postea* indorsed on it, was lost, the Court ordered a new one to be made out from the issue roll and from the associate's notes (*m*).

*Judgment.*] The judgment is amendable at common law, in substance or in form, at any time during the term of which it is signed; and after that time, even after error brought, and *in nullo est erratum* pleaded (*n*), it is amendable for misprision of the clerk, by 8 *H. 6, c. 12*, and 8 *H. 6, c. 15* (*o*). Where a judgment *de bonis propriis* was entered against an executor, instead of judgment *de bonis testatoris*, the Court ordered it to be amended (*p*), even after error brought (*q*). So, where the judgment was "should recover" instead of "do recover," it was allowed to be amended after error brought (*r*). So, where, in debt on bond, judgment was entered by mistake for the penalty as damages, the Court allowed it to be amended after error brought (*s*). So, where the defendant was found not guilty as to part, and there was no judgment for him as to that part, the Court allowed the record to be amended by the verdict (*t*). So, where a verdict was given for more damages than were laid in the declaration, and judgment entered accordingly, the Court allowed the judgment to be amended, and a *remittitur* entered for the excess, even after error brought. (*Ante*, 847). They have refused, however, to amend a judgment entered up on a warrant of attorney, as to the names of the defendants, though the warrant of attorney was correct in that respect, and the judgment might have been amended by it (*u*). So, where a joint judgment was entered upon several *scire facias* against bail, the Court held that it was not amendable after the term of which it was entered (*x*). And the Court of Common Pleas have refused to amend a judgment against an executor, where the amendment would be to his prejudice (*y*). The judgment may be amended by the verdict (*z*), or by the judgment paper (*a*).

After verdict or judgment by confession (and after judgment by default, by 4 & 5 *A. c. 16, s. 2*), the want of a *misericordia* or *capitatur*, or the entry of one for the other (*b*), or the entry of "*ideo*

(*l*) *Doe d. Hitchings v. Lewis*, 1 Bur. 617.

(*m*) *Dayrell v. Bridge*, 2 Str. 1264.

(*n*) *Usher v. Dansey*, 4 M. & Sel. 94; *Foster v. Blackwell*, Barnes, 7; *Davidson v. Wilson*, Id. 18.

(*o*) See *Lady Cass v. Title*, 2 Str. 602; *Wentworth v. Stafford*, 1 Ld. Raym. 68, 5 Mod. 147, S. C.; *Mara v. Quin*, 6 T. R. 1; *Dunbar v. Hitchcock*, 3 M. & Sel. 591, *Green v. Miller*, 2 B. & Adol. 781.

(*p*) *Short v. Coffin*, 5 Bur. 2730, 1 Doug. 116, (n. 1), S. C.

(*q*) *Green v. Rennet*, 1 T. R. 783; and see *Dunbar v. Hitchcock*, 3 M. & Sel. 591.

(*r*) *Blakey v. Birmingham*, 2 Str. 1132; *Slicer v. Thompson*, Id. 1156.

(*s*) MS. E. 1814.

(*t*) *Smith v. Fuller*, 2 Str. 786.

(*u*) *Sale v. Crompton*, 2 Str. 1209, 1 Wils. 61, S. C.

(*x*) *Villars v. Parry*, 1 Ld. Raym. 182, 547, Comb. 307, S. C.

(*y*) *Burroughs v. Stevens*, 5 Taunt. 554; *Prince v. Nicholson*, 6 Taunt. 45.

(*z*) *Smith v. Fuller*, 2 Str. 786.

(*a*) *Parsons v. Gill*, 1 Salk. 50, 2 Ld. Raym. 895, S. C.

(*b*) See *Hackett v. Marshall*, 1 Str. 313.

*concessum est per curiam*" for "*ideo consideratum est per curiam*," or the increased costs after verdict or after nonsuit in replevin not being entered to be at the request of the party for whom judgment is given (c), or the costs in any action not being entered to be by consent of the plaintiff; these, and "all other matters of the like nature," not being against the right of the matter of the suit, nor whereby the trial or issue are altered, are aided by 16 & 17 C. 2, c. 8. (See Vol. 1, 320).

Where the judgment roll was lost, the Court allowed it to be supplied by a new entry (d).

*Scire facias*.] The Court have a power of amending a *scire facias*, for any misprision of the clerks, by stat. 8 H. 6, c. 12, already mentioned, that statute expressly including "writs" generally. (See ante, 833) (e). They have accordingly allowed a *scire facias* to revive a judgment, and the declaration thereon, to be amended (f); and this although execution thereon has been executed and returned (g); and where the *scire facias* is an original proceeding, it may be amended in all cases where an amendment of an original writ would be allowed (h); and the amendment will be allowed although after *nul tiel* record pleaded (i). But the Court have refused to allow a *scire facias* on a recognizance of bail to be amended, in order that the bail might have a further time to render their principal (j). In this case therefore, and in all other cases where leave to amend will not be granted, the plaintiff, if *nul tiel record* be pleaded, should move to quash the writ.

If the defendant plead to the *scire facias*, and the plaintiff proceed to trial, after verdict all defects in form are aided by 18 El. c. 14, and defects both in form and substance, by 5 G. 1, c. 13; and the defects aided after verdict by 18 El. c. 14, are now aided, after judgment by confession or default, by 4 & 5 A. c. 16, s. 2 (k).

*Writ of error, &c.*] A writ of error was not amendable at common law (l). But now, by 5 G. 1, c. 13, all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record, by the respective Courts where such writs of error shall be made returnable. Therefore, where a writ of error was brought jointly with one who should not have been joined, the Court allowed the writ to

(c) See *Tully v. Sparkes*, 2 Str. 869.

(d) *Douglass v. Yallop*, 2 Bur. 722; *Evans v. Thomas*, 2 Str. 433.

(e) *Thorp v. Horn*, 1 Dowl. P. C. 501.

(f) *Braswell v. Jeco*, 9 East, 316. See *Perkins v. Petit*, 2 B. & P. 275, and the cases there cited.

(g) *Thorpe v. Hook*, 1 Dowl. P. C. 501.

(h) *Buzom v. Hoskins*, 6 Mod. 263; *Reg. v. Aires*, 10 Mod. 258, 354; *Res v. Eyre*, 1 Str. 43; 6 Bac. Abr. Sci. Fa. D.

(i) *Hampson v. Chamberlain*, Barnes, 3; *Sweetland v. Beecely*, Id. 4; *Braswell v. Jeco*, 9 East, 316.

(j) *Grey v. Jefferson*, 2 Str. 1165; *Bond v. Turner*, 8 Mod. 305; *Stevenson v. Grant*, 2 New Rep. 103; *Fulwood v. Annis*, 3 B. & P. 321; but see *Sweetland v. Beecely*, Barnes, 4; *Perkins v. Petit*, 2 B. & P. 275.

(k) See 6 Bac. Abr. Sci. Fa. D.

(l) *Thompson v. Crocker*, 1 Salk. 49, 1 Ld. Raym. 564, S. C.; *Walter v. Stokoe*, Id. 71, 5 Mod. 16, 69, S. C.

be amended by striking out his name (*m*). So, a mistake in the name of one of the parties has been amended (*n*); in another case the writ was amended by adding parties (*o*); and in another, by altering even the description of the form of action (*p*). But where the writ is returnable before judgment is given, this is a fault which cannot be amended (*q*).

The amendment in this case is now allowed, as a matter of course, without costs (*r*); but if the rule be also to amend the assignment of errors, it is upon payment of costs (*s*). According to the statute, the writ is to be amended by the Court in which it is returnable; yet this seems to be only in cases where the original record, and not a transcript merely, is removed into such court; and therefore upon a writ of error from the King's Bench to the Exchequer Chamber, it was holden that the writ should be amended in the Court of King's Bench, where the original record lay (*t*). Upon amending a writ of error, new bail must be put in to the amended writ, in the court below (*u*).

If the Court give the defendant in error leave to amend the original record, after the plaintiff has transcribed, they will also order the same amendment to be made in the transcript (*x*). Or if there be any error in the transcript, arising from the misprision of the clerk, the Court will order the master to amend it, and order the record below to be produced before him for the purpose of his making the amendment by it (*y*). And where the clerk of the errors below amended the transcript himself in such a case, without any order from the Court to that effect, and after the defect in the transcript had been assigned for error, this Court refused to order the transcript to be restored to the state in which it was when the plaintiff assigned his errors (*z*).

As to the amendment of an assignment of errors, see 2 Mod. 304, Fitzg. 268.

*Execution.*] Writs of execution may be amended for a misprision

(*m*) *Sword Blade Company v. Dempsey*, 2 Str. 892, Fitzg. 201, 1 Barnard. 405, 421, S. C.; *Verelst v. Rafael*, Cowp. 425; *Rafael v. Verelst*, 2 W. Bl. 1067.

(*n*) *Barnard v. Guy*, 2 Smith, 259.

(*o*) *Lady Cass v. Title*, 2 Str. 612; and see *Baker v. Neaver*, 1 Dowl. P. C. 617, 1 C. & M. 112, S. C.; but see *Lady Cass v. Title*, 1 Str. 606; *Ginger v. Coepper*, 2 Ld. Raym. 1403, 1 Stra. 606, S. C.; *Elkins v. Payne*, 2 Ld. Raym. 1532; *Walter v. Stokoe*, 1 Id. 71, 5 Mod. 69, S. C.; *Hucket v. Hearne*, Carth. 8; *Re v. Inhabitants of All Saints, Derby*, 2 Str. 1110; *M'Namara v. Fisher*, 8 T. R. 302.

(*p*) *Sampayo v. De Payba*, 5 Taunt. 82.

(*q*) *Wright v. Canning*, 2 Str. 807, 2 Ld. Raym. 1531, 1 Barnard. 62, 65, S.

C.; *Rejindoz v. Randolph*, 2 Str. 834; *Vice v. Burton*, Id. 891; *Wilson v. Ingoldsby*, 2 Ld. Raym. 1179; and see Vol. 1, 331.

(*r*) *Gardner v. Merrett*, 2 Str. 902, 2 Ld. Raym. 1587, Fitzg. 268, S. C.

(*s*) Fitzg. 268.

(*t*) *Rutter v. Roistone*, 2 Str. 837; *Tully v. Sparkes*, Id. 869.

(*u*) *Rafael v. Verelst*, 2 W. Bl. 1067.

(*x*) See *Usher v. Dansey*, 4 M. & Sel. 94.

(*y*) *Danbers v. Pender*, 1 Wils. 337. See *Re v. Ponsonby*, Id. 303; *De Tactet v. Rucker*, 3 B. & B. 65, 6 Moore, 135, S. C.; *Richardson v. Mellish*, 3 Bingh. 334.

(*z*) *Randole v. Bailey*, 1 M. & Sel. 232.

of the clerks, by 8 H. 6, c. 12; and the Court have accordingly allowed them to be amended in the teste (a) in the return (b), the names of the parties (c), the sum recovered by the judgment (d), and the like (e), even after they have been executed (f), and this even as against the bail (a). So, if a *fi. facias* or *ca. sa.* be directed to the sheriff of another county, instead of a *testatum*, the plaintiff, upon suing out such a *fi. fa.* or *ca. sa.* as would warrant the former one if it had been a *testatum*, getting it returned, and entering the writ, return, and the award of the *testatum* on the roll, may have leave to amend the former writ by inserting the *testatum* clause, &c. upon payment of costs (g). The writ may be amended by the award of execution on the roll (h), (and for this purpose the entry of the award of it on the roll must be made, and the roll produced in court at the time the motion is made, see Vol. 1, 389, 390), or by the record of the judgment (i).

The Court, however, refused to allow an amendment of a *fi. fa.* where the defendant had become bankrupt before sale of the goods taken in execution under the writ, because the amendment would prejudice the rights of third persons, namely, the assignees and the other creditors (k). And where the defendant died before the application, the Court of Common Pleas refused to amend a *fi. facias* by inserting the *testatum* clause (l).

It may, perhaps, be necessary to add, that the statutes of jeofails do not extend to writs of execution.

*Rules of Court.*] If a rule or order of the Court be drawn up wrong by mistake, the Court, upon application, will order it to be corrected (m).

(a) *Engleheart v. Dunbar*, 12th June, 1833, K. B. MS. 6 Leg. Obs. 237, 1 Dowl. P. C. 202, S. C.

(b) *Thorpe v. Hook*, 1 Dowl. P. C. 501; *Hunt v. Kendrick*, 2 W. Bl. 836; *Atkinson v. Newton*, 2 B. & P. 336.

(c) *Thorpe v. Hook*, 1 Dowl. P. C. 501; *Mackie v. Smith*, 4 Taunt. 322; *Newnham v. Law*, 5 T. R. 577.

(d) *Laroche v. Wasbrough*, 2 T. R. 737.

(e) See *Shaw v. Maxwell*, 6 T. R. 450.

(f) *Thorpe v. Hook*, 1 Dowl. P. C. 501.

(g) *Cowperthwaite v. Owen*, 3 T. R. 657; *Meyer v. Ring*, 1 H. Bl. 541; and see *Allen v. Allen*, 1 W. Bl. 694.

(h) *Atkinson v. Newton*, 2 B. & P. 336.

(i) *Thorpe v. Hook*, 1 Dowl. P. C. 501; *Browne v. Hammond*, Barnes, 10.

(k) *Hunt v. Pasman*, 4 M. & Sel. 329.

(l) *Phillips v. Tanner*, 6 Bingh. 237.

(m) *Tidd*, 452; see *Lopez v. De Tastet*, 8 Taunt. 712.



## CHAPTER XXIX.

## ARREST OF JUDGMENT.

*In what cases.*] THE Court, upon application, will arrest the judgment, for any matter intrinsic appearing upon the face of the record (a), amounting to a defect not amendable or aided at common law or by statute, and for which a writ of error would lie. As to the defects which are amendable or aided at common law and by statute, see the *last Chapter*. After judgment upon a demurrer, however, you cannot move in arrest of judgment, whether the demurrer were argued (b) or not (c); but you may after judgment by default (d).

*Motion, &c.*] If the cause was tried in term, the motion must be made within four days from the time of the trial, if there are so many days in term, and must in all cases be made in the term in which the cause was tried, provided the jury process is returnable in such term. (*R. II. 2 W. 4, r. 65*). So that, if the return day of the *distringas* be even the last day of the term, the motion must be made on that day. If the cause was tried in vacation, the motion should in strictness be made before the expiration of four days after the return day of *distringas*. (*See Vol. 1, 316*) (e). It might formerly, it seems, have been made on any day before judgment was actually signed (f), but this is now otherwise. Before the late rule of *H. T. 1832, supra*, where there were several issues in law and in fact, and the issues in fact were tried first, the Court held that the defendant could not move in arrest of judgment, until after the demurrers had been determined (g). It may be made, however, after a rule for a new trial has been discharged, provided it be made within the time above limited (h); and in this case, after you have obtained the rule *nisi* for a new trial, you should ask leave of the Court to move in arrest of judgment, in case your rule for a new trial should be discharged. (*See ante, 824*).

We have seen, (*ante, Vol. 1, 318*), that by the 1 *W. 4, c. 7, s. 2*, the Judge before whom the action is tried may certify before the end of the sittings or assizes that execution ought to issue forthwith, in which case judgment may be signed, and execution issued, accord-

(a) See *Newball v. Adams*, 8 Taunt. 335.

(b) *Edwards v. Blunt*, 1 Str. 426.

(c) *Creswel v. Packham*, 6 Taunt. 650.

(d) *Edwards v. Blunt*, 1 Str. 425.

(e) See *Lee v. Carlton*, 3 T. R. 642.

(f) *Taylor v. Whitehead*, 2 Doug. 745; *Res v. Perry*, 5 T. R. 455; 1 Tyrw. 225.

(g) *Andr. 282*.

(h) *Taylor v. Whitehead*, 2 Doug. 745.

ing to the terms of the certificate, but that the Court may arrest such judgment, and restore the party to all (if any) he has lost thereby.

If judgment be arrested, each party pays his own costs (i). But where the plaintiff obtained a verdict in the Exchequer, wherein judgment was arrested, which judgment was reversed by the Court of Exchequer Chamber, it was held that the plaintiff was exposed to the costs of the motion in arrest of judgment, and that such costs must be taxed by the officer of the Exchequer (k).

(i) *Cameron v. Reynolds*, Cowp. 407.  
Gillb C. P. 272.

(k) *Adams v. Meredith*, 3 Y. & J. 419.

## CHAPTER XXX.

At common law, neither the plaintiff nor the defendant were entitled to costs. In all actions, however, in which damages were recoverable, the plaintiff, if he had a verdict, was in effect allowed his costs; for the jury always computed them in the damages. But the defendant was wholly without remedy for any expenses he had been put to, if he had a verdict, or the plaintiff were nonsuit; the amercement to which the plaintiff was subject in such a case, *pro falso clamore suo*, going entirely to the king.

This, however, has since been remedied by statute. By *stat. Gloucester*, (6 Ed. 1), c. 1, the plaintiff, in all actions in which he recovers damages, shall also recover against the defendant his costs of suit (a); which statute extends to all cases in which single damages have been given by a subsequent statute (b), and also to cases where an action is given to a party grieved (c), but not to *qui tam* actions by a common informer (d). The circumstance that the plaintiff's cause has been conducted by one who is not an attorney, does not deprive the plaintiff of his right to full costs against the defendant (e). As to defendants, they are also now entitled to costs if they have a verdict, or if the plaintiff be nonsuit after appearance, in all actions in which the plaintiff would be entitled to costs if he recovered. (4 J. 1, c. 3; 23 H. 8, c. 15).

But the statute of Gloucester, giving costs to the plaintiff in all cases where he recovered damages, as above mentioned, was found to have the effect of encouraging suits for very trifling causes; and the legislature, therefore, were obliged to interfere, and have in some measure remedied the evil, by enacting that if the plaintiff, in certain cases, recover less than 40s. damages, he shall be entitled to no more costs than damages. The statutes making this provision shall be mentioned particularly in the course of the present chapter.

Having made these few observations upon the subject of costs, generally, we shall now consider it, more particularly, under the following heads:—

*Verdict for plaintiff.]* The general rule, established by the statute

(a) See *Garland v. Jekyll*, 2 Bingh. 330, 9 Moore, 620, S. C.

(b) *Jackson v. Calenworth*, 1 T. R. 73.

(c) *Creswell v. Hoghton*, 7 T. R. 268; *Mayor, &c. of Plymouth v. Werring*, Willes, 440; *Shore v. Madisten*, 1 Salk.

206; *College of Physicians v. Harrison*, 9 B. & C. 524; 2 Bac. Abr. Costs, E. 3.

(d) *Shore v. Madisten*, 1 Salk. 206; and *vide post*, 859.

(e) *Reeder v. Bloom*, 3 Bingh. 9, 10 Moore, 261, S. C.; *Anon. v. Sexton*, 1 Dowl. P. C. 180; *ante*, Vol. 1, 24, 26.

of Gloucester, as above mentioned; is, that the plaintiff is entitled to his costs in all cases where he recovers damages. To this, however, there are some exceptions; and first, by 43 *El. c. 6, s. 2*, if in a personal action, not being for any title or interest in lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall be certified by the Judge before whom it shall be tried, that the debt or damages to be recovered therein do not amount to 40s., the plaintiff shall have no more costs than damages (*f*). The object of the statute was to confine trifling suits to inferior courts, or, in other terms, to prevent the bringing of actions which in point of principle ought not to be commenced at all (*g*). Even in actions upon statutes giving the plaintiff "full costs of suit," the Judge may certify under this statute; which will have the effect of giving the plaintiff no more costs than damages (*h*). Thus, in an action for an assault and battery, with a separate count for a false imprisonment, and verdict for one shilling damages, the Judge having certified under this statute, the Court refused to tax the plaintiff his costs (*i*). In an action against an attorney, where there is a verdict for less than 40s. damages, the Judge may certify under this statute to prevent plaintiff from recovering his costs (*j*). And although the defendant could only be sued in the superior Court, the Judge may so certify (*k*). If from the pleadings it appears that the title or interest in lands, or the freehold or inheritance therein, necessarily came in question, or a battery be admitted, the Judge cannot, it seems, certify so as to deprive the plaintiff of costs (*l*). The certificate, in this case, may be granted at any time after the trial (*m*).

In *assumpsit* and *covenant*, therefore, the plaintiff, if he have a verdict, is in all cases entitled to costs, unless the damages be under 40s.; and even in that case, unless the Judge certify under 43 *El. c. 6*, as above mentioned.

And the same in *debt* on simple contract, and in *debt* on specialty, unless the debt and damages be under 40s., and the Judge certify. But in *debt* on a penal statute by a common informer, the plaintiff is not entitled to costs in any case, unless expressly given by the statute creating the penalty (*n*). And in *debt* on judgment the plaintiff shall not be entitled to any costs of suit, unless the Court in which such action shall be brought, or some Judge of the same Court, shall otherwise order; (43 *G. 3, c. 46, s. 4*); which statute, however, extends only to actions brought upon judgments obtained by plaintiffs, and

(*f*) See *Hullock*, 19, 27; *Walker v. Robinson*, 2 Str. 1232, 1 Wils. 113, S. C.; *Hoeard v. Cheshire*, Say. 260; *Dand v. Serton*, 3 T. R. 37.

(*g*) *Per Burroughs, J.*, in *Pyeburn v. Gibson*, 8 Moore, 450.

(*h*) *Irvine v. Reddish*, 5 B. & Ald. 796, 1 D. & R. 413, S. C.

(*i*) *Briggs v. Bowgin*, 2 Bingh. 333, 9 Moore, 628, S. C.

(*j*) *Wright v. Nuttall*, 10 B. & C. 492.

(*k*) *Id.*; and see *Pyeburn v. Gibson*,

8 Moore, 450.

(*l*) *Littlewood v. Wilkinson*, 9 Price, 314; and see *Wright v. Pigginn*, 2 Y. & J. 544.

(*m*) *Holland v. Gore*, 3 T. R. 38, n.; Say. Costs, 18; and see *Fosall v. Banks*, 5 B. & Ald. 536.

(*n*) 2 Bac. Abr. Costs, E. 3; Bul. N. P. 333; *Shore v. Madisten*, 1 Salk. 206; *Hullock*, 1212; and see *Woodgate v. Knatchbull*, 2 T. R. 154; stat. 8 & 9 W. 3, c. 11; *Barnard v. Moss*, 1 H. Bl. 107.

not to such as are brought upon judgments of nonsuit, or the like (o). And in an action on a judgment, the Court refused to stay proceedings on payment of the debt without costs, where there was probable ground for the plaintiff's claiming also interest on part of the debt (p). The Court would allow the plaintiff his costs if defendant pleaded a sham plea, as *nul tiel record*, &c. (q).

In *trespass*, also, the general rule is, that the plaintiff, if he have a verdict, shall have his costs of suit, however trifling the damages may be. This rule, however, is considerably narrowed by the following statutes:—By 22 & 23 C. 2, c. 9, in all actions of trespass, assault and battery, and other personal actions, wherein the Judge at the trial shall not certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved, or that the freehold or title of the land was chiefly in question, if the jury find damages under 40*s.* the plaintiff shall recover no more costs than damages. But this statute, as also the 21 J. 1, c. 16, only restrains the Court from awarding more costs than damages; and the jury not being restrained thereby may give what costs they please (r). This statute extends only to actions for assault and battery, and to such personal actions as relate to the *freehold* or to things fixed to the freehold, that is, to cases where the freehold may by presumption come in question (s). It does not extend, therefore, to trespass to a *personal* chattel, as trespass *de bonis asportatis* (t); nor to trespass *de bonis asportatis*, with a count for a trespass to the freehold, if the plaintiff have a verdict on both counts (u), or on the *asportavit* count only (x); nor to trespass for breaking the plaintiff's close, and impounding his cattle (y); nor to trespass and assault upon, and criminal conversation with, the plaintiff's wife (z); nor to assault and false imprisonment (a). But the statute extends to actions of trespass, though there be laid in the declaration a *consequential* damage arising to personal property, &c. Therefore, in trespass for assaulting and beating, and turning plaintiff out of a room, whereby he was prevented exercising his business of an attorney there, and defendant plead the general issue, and plaintiff have a verdict for less than 40*s.*, he will have no more costs than damages, unless the Judge certify (b). So, in an action for assault and battery, and tearing the plaintiff's clothes, if the plaintiff have a verdict for less than 40*s.*, he shall have no more costs than damages, unless the Judge certify; because the tearing of the clothes is a mere consequence of the battery, and not a substan-

(o) *Bennett v. Neale*, 14 East, 343.

(p) *Wood v. Silletto*, 1 Chit. Rep. 473.

(q) *Samuel v. Barker*, 5 Taunt. 264.

(r) Cas. Prac. C. P. 45, Pr. Reg. C. P. 112, S. C.; *Brotene v. Gibbons*, 1 Salk. 207.

(s) Bul. N. P. 329; *Ven v. Phillips*, 1 Salk. 208; 1 Saund. 5th ed. 300 n.

(t) *Ven v. Phillips*, 1 Salk. 208; *Smith v. Clarke*, 2 Str. 1130. See 1 Esp. 255; 1 Str. 634, 633; 2 Vent. 215; 1 Stark.

(u) *Lately v. Fry*, Comyn's Rep. 19.

(x) 1 Freem. 394.

(y) *Barnes v. Edgard*, 3 Mod. 39. See *Ven v. Phillips*, 1 Salk. 208; *Keen v. Whistler*, 1 Str. 534; *Thompson v. Berry*, Id. 551; and see *Anderson v. Buckton*, Id. 192.

(z) *Batchelor v. Bigg*, 3 Wils. 319, 2 W. Bl. 854, S. C.

(a) See *Carter v. Fisk*, 1 Str. 645; *Wiffin v. Kincaid*, 2 New Rep. 471.

(b) *Daubney v. Cooper*, 10 B. & C. 830; and see *Bannister v. Fisher*, 1 Taunt. 357.

tive cause of action (c). Even in cases clearly within the statute, however, if the defendant plead a justification, the plaintiff shall have full costs, without a certificate, although the verdict be for less than 40s. (d). And in a late case, it was held that if the defendant plead a disclaimer of title, that the trespasses were voluntary, and a tender of amends, and it is found against him, the plaintiff is entitled to full costs, though he do not recover 40s. damages (e). So, a certificate is unnecessary in an action of trespass *quare clausum fregit*, wherever the defendant pleads a special plea which is found against him, whatever be the nature of that plea; for the plea must shew, either that the freehold cannot come in question, in which case the statute does not apply; or that it does, in which case a certificate is unnecessary, for it would be idle to require a certificate of that which appears already by the record (f). So, if the special plea be not traversed, or if it be traversed and found for the defendant, yet if the plaintiff new assign, and defendant plead not guilty to the new assignment, and it be found against him, no certificate is necessary (g): for though the right, as claimed by the plea, be determined in favour of the defendant, yet the applicability of that right to the trespass complained of is put in issue by the new assignment and plea thereto; and, therefore, it appears by the whole record whether the freehold come in question or not; unless, indeed, it be quite manifest from the nature of the plea and new assignment, that the matter covered by the plea is no longer at all in question; as where the plea set out the right of way by metes and bounds, and the plaintiff newly assigned *extra viam*, so that the extent of the way was admitted (h). In cases of this kind, therefore, if defendant is not certain of succeeding on the new assignment, he should suffer a judgment by default thereto; and if he has pleaded not guilty to the declaration, he should take care also to withdraw such plea, so far as the same can relate to the trespass newly assigned; for, if he did not adopt the latter course, and a verdict were found for the plaintiff on the general issue, plaintiff would be entitled to the *postea* and the general costs of the trial, notwithstanding defendant succeeded on his special pleas (i). Therefore, where to an action of trespass *quare clausum fregit*, the defendant pleaded not guilty, and justifications under a right of way, issue was joined on the plea of not guilty, the right of way was traversed and issue joined thereon, and the plaintiff new assigned, and defendant suffered judgment by default thereon; a verdict was found for plaintiff, on the issue of not guilty,

(c) *Cotterill v. Tolly*, 1 T. R. 655; *Lockwood v. Stannard*, 5 T. R. 482; *Mears v. Greenaway*, 1 H. Bl. 291.

(d) *Smith v. Edge*, 6 T. R. 562; *Martin v. Vallance*, 1 East, 350; *Redridge v. Palmer*, 2 H. Bl. 2, 342; *Taylor v. Nicholls*, 3 B. & Ald. 443; *Johnson v. Northwood*, 7 Taunt. 689, 1 Moore, 420, S.C.; *Peddle v. Kiddle*, 7 T. R. 659.

(e) *Wright v. Piggin*, 2 Y. & J. 540,

547.

(f) 1 Saund. 300, n., and cases in note, *supra*.

(g) *Asser v. Finch*, 2 Lev. 234; *Taylor v. Nicholls*, 3 B. & Ald. 443; 1 Saund. 300, n., 5th ed.

(h) *Cockerill v. Allanson*, Hullock on Costs, 76; 1 Saund. 300, n., 5th ed.

(i) See 1 Saund. 300 a, n.

with 1*s.* damages, and 40*s.* damages on the new assignment; and a verdict was found for defendant on one of the justifications; it was held that the plaintiff was entitled to the general costs in the cause (*k*). Had defendant withdrawn his plea of not guilty to the trespass newly assigned, then the defendant would have obtained the general costs of the cause, and the plaintiff only the costs of the inquiry (*l*). It was formerly holden, that if a view were granted in the cause, it had the same effect as a plea of justification (*m*); but it has been since determined otherwise (*n*). But although a particular case be not within the statute, (as, for instance, an action for assault and false imprisonment (*o*)), yet if it be within the *stat.* 48 *El.* c. 6, above-mentioned, the plaintiff may be deprived of costs, by the Judge granting a certificate under that statute (*p*). (See further, upon the construction of this statute, 2 *Bac. Abr. Costs*, B. 1; *Hullock*, 34 to 84; 1 *Saund.* 300 n.; *Bul. N. P.* 329). It may be necessary to add, that it does not extend to inquisitions upon writs of inquiry in any case (*r*). The certificate in this case may be granted out of court at any time between verdict and final judgment (*s*).

But by 8 & 9 *W.* 3, c. 11, if the Judge certify that the trespass was wilful and malicious, the plaintiff shall have his full costs, although the verdict be for less than 40*s.* (*t*). Where the trespass has been committed after notice, the Judge usually certifies under this act (*u*); but it is perfectly discretionary with him to do so or not (*x*); and he will not certify, if it appear that the trespass was committed for the purpose of asserting a disputed right (*y*). The certificate, in this case, also may be granted out of court, at any time between verdict and final judgment (*z*).

And if any inferior tradesman, apprentice, or other dissolute person, shall presume to hawk, hunt, fish, or fowl, and shall be found guilty of trespass in coming upon other men's land for that purpose; the plaintiff in such action shall recover his full costs of suit, although the damages be under 40*s.* (4 & 5 *W. & M.* c. 2, s. 10) (*a*).

In actions on the case for torts, the plaintiff is in general entitled to his full costs of suit in all cases, however trifling the damages may be, unless the Judge certify under the above *stat.* 43 *El.* c. 6 (*b*); except in actions for "slanderous words," in which, by 21 *J.* 1, c. 16, if the damages found be under 40*s.* the plaintiff shall recover no more costs than damages. This statute, however, extends only to such words as

(*k*) *Vickers v. Gallimore*, 5 *Blagh.* 196; and see *House v. Thames Commissioners*, 3 *B. & B.* 117; *Langden v. Bourne*, 1 *B. & C.* 278; *Broadbent v. Shaw*, 2 *B. & Adol.* 940.

(*l*) *Cross v. Johnson*, 9 *B. & C.* 613; *Forrester v. Dale*, 1 *Dowl. P. C.* 412.

(*m*) *Kompter v. Deacon*, 2 *Salk.* 665, 1 *Ld. Raym.* 76, *S. C.*

(*n*) *Filsh v. Hill*, 11 *East*, 184.

(*o*) *Wiffin v. Kincard*, 2 *New Rep.* 471.

(*p*) *Briggs v. Bowgin*, 2 *Bingh.* 333, 9 *Moore*, 620, *S. C.*

(*r*) *Bul. N. P.* 329.

(*s*) *Johnson v. Stanton*, 4 *D. & R.*

156, 2 *B. & C.* 621, *S. C.*

(*t*) See *Hullock*, 94 to 99.

(*u*) See *Reynold v. Edwards*, 6 *T. R.*

11.

(*x*) *Good v. Watkins*, 3 *East*, 495.

(*y*) *Id.*

(*z*) *Woolley v. Whitby*, 2 *B. & C.* 589,

4 *D. & R.* 147, *S. C.*; *Gundry v. Sturt*, 1 *T. R.* 636.

(*a*) See *Burton v. Mingay*, 2 *Wils.*

70; *Pallant v. Roll*, 2 *W. Bl.* 900; *Hullock*, 84 to 93; *Deacon*, *G. L.* 198.

(*b*) See *Edmondson v. Edmondson*, 8 *East*, 294; *Williams v. Miller*, 1 *Taunt.* 400.

are actionable of themselves (c). It does not, therefore, extend to actions for slander of title (d), or to other actions where the special damage is the very gist of the action (e). But it extends to words actionable only in respect of their being spoken of the plaintiff in his trade, or the like (f). The statute applies to writs of inquiry as well as a trial where the damage is under 40s. (g). The statute, however, only restrains the Court from awarding more costs than damages; but the jury not being restrained thereby may give what costs they please (h).

In actions on statutes, by parties grieved, the plaintiff, if he have a verdict, is entitled to costs, as in other cases (i). (*Ante*, 854).

If the plaintiff do not recover the amount of the sum for which he held the defendant to bail, the Court, upon motion, shall direct that the defendant be allowed his costs, if it be made appear by affidavit, to the satisfaction of the Court, that the plaintiff had not any "reasonable or probable cause" for holding the defendant to bail in such amount as aforesaid; and if the Court make a rule or order to this effect, the plaintiff shall thereupon be disabled from suing out execution, excepting for the excess of the sum recovered by him, above the costs taxed for the defendant; or if the costs taxed for the defendant exceed the sum recovered by the plaintiff, the defendant may have execution for the excess. (43 G. 3, c. 46, s. 3) (k). If, for instance, two persons be mutually indebted to each other, and one of them hold the other to bail for the whole amount of the debtor side of the account, instead of for the balance merely, the Court upon application will allow the defendant his costs, under this statute (l). So, where a defendant was holden to bail for the amount of board and lodging, charged at the rate of 2*l.* per week, and at the trial it was proved that the plaintiff had expressly agreed to charge at the rate of 1*l.* per week only, and there was a verdict accordingly, the Court upon application allowed the defendant his costs under this statute, although the plaintiff denied by his affidavit that he had made any such agreement as that proved at the trial (m). And where the plaintiff had sold goods to the defendant to be paid for half in ready money, and half by bill at three months; and the defendant having refused to pay the half in ready money, the plaintiff arrested him for the full price of the goods, the Court held he had no reasonable or probable cause for so doing, and that the defendant

(c) *Collier v. Gaillard*, 2 W. Bl. 1062; *Surnan v. Shelloto*, 3 Bur. 1688; *Sawle v. Jardine*, 2 H. Bl. 531; *Turner v. Horton*, Willes, 438; *Hullock*, 27, 34; *Tidd*, 9th ed. 962.

(d) *Laue v. Harwood*, Cro. Car. 141.

(e) *Brown v. Gibbons*, 2 Ld. Raym. 831; *Barry v. Perry*, Id. 1588, 2 Stra. 906, S. C.; *Carter v. Fish*, 1 Id. 645.

(f) *Greenfell v. Pierson*, 1 Dowl. P. C. 406.

(g) *Lampen v. Hatch*, 2 Stra. 934.

(h) *Browne v. Gibbons*, 1 Salk. 207.

(i) *Shore v. Madisten*, 1 Salk. 206.

(k) See *Clarke v. Fisher*, 1 Smith, 428; *Younie v. Mallison*, Id. 521; *Anon.* 2 Id. 261, 667; *Thompson v. Atkinson*, 6 B. & C. 193; *Robinson v. Elsom*, 5 B. & Ald. 661. See the form, Chit. Forms, 307.

(l) *Dronefield v. Archer*, 5 B. & Ald. 513, 1 D. & R. 67, S. C.; and see *Austin v. Debnam*, 4 D. & R. 653, 3 B. & C. 139, S. C.

(m) *Glenville v. Hutchins*, 1 B. & C. 91; and see *Linsley v. Bates*, 2 C. & J. 664.



was entitled to his costs pursuant to the above statute (*n*). And where defendant was arrested for a sum in respect of the greater portion of which the plaintiff knew at the time that the defendant had obtained a discharge under the Insolvent Debtors' Act, the Court gave the defendant his costs under the above statute (*o*). It is not necessary, to bring a case within this statute, to shew *malice* (*p*).

On the other hand, where defendant being arrested for 500*l.* set up her coverture as a defence, and plaintiff recovered only 38*l.* for money advanced after the death of her husband; upon an application by defendant for costs under the above act, the plaintiff having deposed that he was ignorant of the coverture, and that not being contradicted, the Court would not grant the application (*q*). And according to the *dictum* of *Tindal*, C. J. (*r*), the defendant will not in general get his costs under the above act, unless the sum for which the defendant was held to bail be materially larger than that which is found to be due. But if a defendant, upon being arrested for a certain sum, pay a less sum into court, the plaintiff, by taking that sum out of court and discontinuing the action, will not thereby subject himself to costs under this statute (*s*). Or if the matter be referred to arbitration, and the arbitrator award the plaintiff a less sum than that for which he had holden the defendant to bail, the Court will not in such a case allow the defendant his costs under this statute (*t*). So, where the defendant, who was arrested for 327*l.*, had tendered 250*l.*, but did not pay it into court, and an arbitrator to whom the cause was referred awarded the plaintiff only 250*l.*, the Court held this was not a case to entitle defendant to costs under the statute (*u*). And where, after an arrest for 100*l.*, there was a verdict for the plaintiff subject to an award, and the costs were directed to abide the event; the arbitrator having found 39*l.* 18*s.* to be due, and the transactions between the parties being complicated, the Court refused to allow the defendant his costs under the above act (*x*). And the Court will not give the defendant his costs where there is a reasonable doubt in law as to the plaintiff's right to recover part of his demand (*y*). The act does not extend to cases where the defendant has not been actually arrested or held to bail (*z*). Nor does it extend to actions originally

(*n*) *Day v. Picton*, 10 B. & C. 120, 5 M. & R. 31, S. C.

(*o*) *Lord Huntingtower v. Heely*, 7 D. & R. 369; and see further, *Egle v. Wynne*, 2 Dowl. P. C. 23.

(*p*) *Donlan v. Brett*, 10 B. & C. 117, 4 M. & R. 29, S. C.; *Hall v. Forget*, 1 Dowl. P. C. 696.

(*q*) *Spooner v. Danks*, 7 Bingh. 772, 5 M. & P. 701, 1 Dowl. P. C. 232, S. C.; and see *Roper v. Sheasby*, 1 C. & M. 496.

(*r*) See *Sherwood v. Taylor*, 6 Bingh. 281, 3 M. & P. 641, S. C.

(*s*) *Porter v. Pittman*, 2 D. & R. 266; *Davey v. Renton*, 4 D. & R. 187, 2 B. & C. 711, S. C.; *Rouvery v. Alefson*, 13

East, 90; *Butler v. Brown*, 1 B. & B. 66.

(*t*) *Keene v. Deeble*, 5 D. & R. 383, 3 B. & C. 491, S. C.; *Payne v. Acton*, 1 B. & B. 278.

(*u*) *Sherwood v. Taylor*, 6 Bingh. 280, 3 M. & P. 641, S. C.

(*x*) *Turner v. Prince*, 5 Bingh. 191, 2 M. & P. 305, S. C.; and see *Handley v. Levi*, 8 B. & C. 637, 3 M. & R. 37, S. C.

(*y*) *Stovin v. Taylor*, 1 Dowl. P. C. 697; 1 Nev. & M. 250.

(*z*) *Amor v. Blagfield*, 1 Dowl. P. C. 277; and see *Berry v. Adamson*, 6 B. & C. 528.

brought in an inferior court (as the Palace Court, &c.), and removed into this Court (a).

There are various acts of parliament establishing *courts of requests* for the recovery of small sums throughout the kingdom; some prohibiting parties from bringing actions in any other court, others depriving the plaintiff of his costs, and others making him pay defendant's costs if he sue in any other court. The general principles applicable to the construction of these statutes will be found *post*, 871, 872.

It should seem that the Welsh Judicature Act, (5 G. 4, c. 106), which enacts that the plaintiff shall be nonsuited, and pay defendant his costs in certain actions brought in the superior courts out of the principality of Wales, for causes of action arising in the principality, &c. not amounting to 50*l.*, is virtually repealed by the 1 W. 4, c. 70.

Where the cause is made a *remanet*, the costs incurred, in bringing up witnesses, attendances, &c. are allowed to the party ultimately prevailing (b); and the same, where a cause goes off upon any other occasion, without the fault or contrivance of the parties, and is afterwards brought to trial (c).

As to the costs of a special jury, see Vol. 1, 260.

*Verdict for defendant.*] In all cases in which a plaintiff would be entitled to costs, if he recovered, the defendant shall have his costs, if a verdict be found for him. (4 J. 1, c. 3; see also 23 H. 8, c. 15) (d). Also, in actions upon penal statutes by common informers, the defendant is entitled to his costs, if he have a verdict. (18 El. c. 5) (e).

Previous to the recent act, 3 & 4 W. 4, c. 42, if in *trespass*, *assault*, *false imprisonment*, or *ejectment*, there were several defendants, and one of them was acquitted, the person so acquitted might (as he now may since that act) recover his costs, in the like manner as if a verdict had been given against the plaintiff, unless the Judge, immediately after the trial, *in open court*, certified upon the record that there was a reasonable cause for making such person a defendant. (8 & 9 W. 3, c. 11) (f). This statute, however, did not extend to *replevin* (g), or to *trespass* on the case for a tort (h), or *trover* (i), nor to debt on bond against executors, one of whom was acquitted on the plea of *plene administravit præter* (k). In cases within the above

(a) *Costello v. Corlett*, 4 Bingh. 474, 1 M. & P. 315, S. C.; *Handley v. Levy*, 8 B. & C. 637, 3 M. & R. 37, S. C.; *James v. Dawson*, 1 Dowl. P. C. 341; *Connell v. Watson*, 2 Dowl. P. C. 139.

(b) *Standen v. Hall*, Say. 272; *Gibbins v. Phillips*, 8 B. & C. 438, 2 M. & R. 236, S. C.

(c) *Hurchall v. Bellamy*, 5 Bur. 2693.

(d) *Millar v. Yerraway*, 3 Bur. 1723; 2 Bac. Abr. Costs, D.; *Hullock*, 121, 134.

(e) *Hullock*, 214, 220. See *Kirkham v. Wheeley*, 1 Salk. 30; *Wilkinson v. Allot*, Cowp. 366; 1 Wils. 139; *Garland v. Burton*, 2 Str. 1103.

(f) See *Aaron v. Alexander*, 3 Camp. 35; *Hullock*, 140, 144.

(g) *Marriner v. Barret*, 3 Bur. 1284; *Ingle v. Wordworth*, 1 W. Bl. 355.

(h) *Dibben v. Cooke*, 2 Str. 1005.

(i) *Poole v. Boulton*, Barnes, 139.

(k) *Norfolk, Duke of, v. Anthony Tidd*, 986.

clause of the stat. 8 & 9 W. 3, c. 11, if the defendants had pleaded jointly, only 40s. costs were allowed to the defendant acquitted (*l*). To have entitled him to full costs he should have pleaded separately, and perhaps by a separate attorney. In all cases not within that statute, if the plaintiff had proceeded to trial against several defendants, and obtained a verdict against any one of them, the others were entitled to costs, the Court having construed the former acts to relate only to the case of an acquittal of all the defendants (*m*). But now by 3 & 4 W. 4, c. 42, s. 32, it is enacted, "That, where several persons shall be made defendants in *any personal* action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial of such action shall have a *verdict* pass for him or them, every such person shall have judgment for and recover his *reasonable* costs, unless, in the case of a trial, the Judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action."

Where some only of several defendants proceeded to trial, the others having suffered judgment by default, and those who proceeded to trial obtained a verdict, the defendants who obtained a verdict in such a case were entitled to their costs, under the above statute of 4 J. 1, c. 3, and although the plaintiff had his judgment and costs against the others who suffered judgment by default (*n*); and this is still the law. So, if one of several defendants permit judgment to go by default, and the other plead a plea which goes to the whole declaration, and such plea be found for the party pleading it, he shall have costs, and such plea being an absolute bar to the action, the other defendant shall have the advantage of it; and shall not pay costs to the plaintiff upon the judgment by default (*o*). Where, in an action *ex contractu* against several defendants, who sever in their defences, judgment is obtained by one whose plea amounts to an absolute bar, the other defendants will be entitled to the benefit of it, and not liable to pay costs; but if such plea be merely a personal discharge to the party pleading it, the others will still be liable to the plaintiff for costs if they fail on their own pleas, though the plaintiff fail as to the other (*p*).

Where there are several defendants who succeed in the action, the plaintiff may pay costs to which of them he pleases, and when they fail, each defendant is liable for the whole costs; but if after satisfaction from any one the plaintiff takes out execution against an-

(*l*) *Hughes v. Chitty*, 2 M. & Sel. 172. Upon the stat. 52 G. 3, c. 113, s. 93, (Birmingham Paving Act), which gives costs in all cases where a verdict shall be found for any defendant, it was held that four of several defendants who had obtained verdicts were entitled to costs, although the verdict

was against the rest. *Hall v. Smith*, 2 Bingh. 267.

(*m*) *Dibben v. Cooke*, 2 Str. 1005.

(*n*) *Shrubb v. Barrett*, 2 H. Bl. 28.

(*o*) *Tidd*, 985; *Hull. Costs*, 143.

(*p*) *Noke v. Ingham*, 1 Wils. 89; *Baylis v. Dinely*, 2 Chit. Rep. 153.

other, such defendant may apply to the Court (*r*). Where the plaintiffs brought four actions against two insurance companies for a loss by fire, and a verdict was found for the former against each company on two of the causes only, the Court held that costs were to be apportioned equally, although three causes only were set down for trial at the same sittings, there being a demurrer pending in the other (*s*). One defendant, who had given a general release to the plaintiff after the costs of nonsuit had been taxed, was ordered to pay to the other defendants their shares (*t*).

*Nonsuit and nonpros.*] If, after appearance of the defendant, the plaintiff be nonsuit, the defendant shall have judgment to recover his costs, in all actions in which the plaintiff would be entitled to costs if he recovered, (4 *J.* 1, c. 3) (*u*); and also in penal actions by common informers. (18 *El.* c. 5) (*v*).

Upon judgment of *nonpros*, the defendant is entitled to costs in all cases, (*ante*, 792), even in actions by common informers upon penal statutes. (18 *El.* c. 5) (*x*).

*Judgment by default.*] As to the costs on, *see ante*, 505.

*Demurrer.*] As to the costs on, *see ante*, 481.

*Error—Bill of exceptions.*] As to costs in error, *see Vol.* 1, 356, 361, 367; *Hullock*, 280—299; 2 *Bac. Abr. Costs*, G.; *Ricketts v. Lewis*, 1 *B. & Adol.* 197. And as to costs upon a bill of exceptions, *see Vol.* 1, 300; *Bell v. Potts*, 5 *East*, 49; *Gardner v. Baillie*, 1 *B. & P.* 32.

*Where there are several issues.*] By the rule of *H. T.* 2 *W.* 4, r. 74, "no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." This rule was made for the benefit of defendants, and puts an end to the former unjust practice, in some cases, of allowing the plaintiff his costs, and, in others, of disallowing the defendant the defendant's costs on issues on which the defendant succeeded (*y*). In accordance with this rule, in a late case, where the general issue was pleaded

(*r*) *Wilson v. Foote*, Bull. N. P. 335.

(*s*) *Severne v. Olive*, and *Same v. Slade*, 6 *Moore*, 235.

(*t*) *Darlow v. Collinson*, Bull. N. P. 335.

(*u*) *See Rez v. Midlam*, 3 *Bur.* 1720; *Davila v. Herring*, 1 *Str.* 300; *Cameron v. Reynolds*, Cowp. 407; *Michlam v. Bate*, 8 *B. & C.* 642, 3 *M. & R.* 91, *S. C.*

(*v*) *See Wilkinson v. Allott*, Cowp. 306; *Williams v. Drew*, Willes, 392;

*Mayor, &c., of Plymouth v. Werring*, Id. 440.

(*x*) *Lavo v. Worral*, 1 *Wils.* 177.

(*y*) *See Butcher v. Green*, 2 *Doug.*

677; *Postan v. Stanway*, 5 *East*, 261;

*Penson v. Lee*, 2 *B. & P.* 333; 4 *B. &*

*Ald.* 43, 700; *Rez v. Commissioners of*

*the Thames*, 3 *B. & B.* 117, 6 *Moore*,

324, *S. C.*; *Longden v. Bourne*, 1 *B. &*

*Cres.* 278; *Cross v. Johnson*, 9 *B. & Cres.*

613; *Atley v. Young*, 2 *Burr.* 1232.

to a declaration containing several counts, and the defendant succeeded under it as to some of those counts, he was held entitled to the costs occasioned by them (*y*); for the general issue to the whole declaration containing several counts, tenders a distinct issue to each of the counts. But the plaintiff is still entitled to the general costs of the cause if he succeeds, (*infra*). Neither party will be entitled to the costs of issues from the trial of which the jury have been discharged (*z*). Where immaterial issues are found in favour of the defendant, and judgment is afterwards entered for plaintiff *non obstante veredicto*, neither party is entitled to the costs of the immaterial issues (*a*). In a case decided before this rule, where a declaration consisted of one count only, and the defendant justified as to part, the plaintiff now assigned without taking issue on the special plea, and obtained a verdict; the Court held that he was entitled to the costs of all the pleadings (*b*).

As to the mode of taxation, supposing that there are several issues in fact joined upon two counts, and one be found for the plaintiff and the other found for the defendant, the plaintiff shall have the *postea*, and the costs of the cause, (with the exception of the costs of such parts of the pleadings and briefs, and of such of the witnesses, &c. as are applicable only to the count on which the defendant has succeeded, which costs the defendant will be entitled to have deducted from the plaintiff's costs). And it is further to be observed, as to the costs of the witnesses, that where a plaintiff succeeds on one of several issues, and the defendant succeeds on the others, but the defendant's witnesses are as necessary on the issues found against him as on the issues found for him, the plaintiff will be entitled to the costs of all his witnesses upon the issues found for him, and the defendant to none of his (*c*).

As to double pleas:—By 4 & 5 A. c. 16, ss. 4, 5, any defendant, or plaintiff in replevin, may, with leave of the Court, plead as many several matters as he shall think necessary for his defence, provided that if any such matter shall, upon demurrer joined, be judged insufficient, costs shall be given at the discretion of the Court (*d*); or if a verdict shall be found upon any issue in the said cause for the plaintiff, or defendant in replevin, costs shall also be given in like manner, unless the Judge who tried the said issue shall certify that the said defendant or plaintiff in replevin had a probable cause to plead such matter (*e*). Where the defendant pleads several pleas in bar, each going to the whole declaration, if he succeed upon any one sufficient plea, he must have judgment upon the whole declaration, although the plaintiff succeed upon the other pleas, because by his plea he has

(*y*) *Cox v. Thomason*, 1 Dowl. P. C. 572, 2 C. & J. 498, S. C.; *Knight v. Brown*, 1 Dowl. P. C. 730.

(*z*) *Vallance v. Adams*, 2 Dowl. P. C. 118.

(*a*) *Goodburne v. Bowman*, 9 Bingh. 667; 2 Dowl. P. C. 206, S. C.

(*b*) *Gundry v. Sturt*, 1 T. R. 636;

*Taylor v. Nicholls*, 3 B. & Ald. 443.

(*c*) *Richards v. Cohen*, 1 Dowl. P. C. 533.

(*d*) See *Duberley v. Page*, 2 T. R. 391.

(*e*) See Bul. N. P. 334; *Mullock*, 99 to 119.

shewn that the plaintiff had no sufficient cause of action against him; and in such a case he is entitled to the *postea*, and the costs of the cause (*f*), with the exception of the costs of such part of the pleadings and briefs, and of such of the witnesses, &c. as are applicable only to the issues found for the plaintiff (*g*). But, by virtue of the above clause of the stat. 4 & 5 A. c. 16, if the plaintiff also succeed, either upon demurrer or by verdict, upon any of the other pleas, he shall have his costs of the issue or issues upon which he has so succeeded, to be deducted from the defendant's costs, unless the Judge certify that the defendant had probable cause for pleading those pleas upon which the plaintiff has succeeded (*h*); and the same as to a defendant or avowant in replevin (*i*). And the costs in these cases are the costs of such part of the pleadings and briefs, and of such of the witnesses, &c. as are applicable to the issues found for the plaintiff (*k*).

It is right, however, to add, that what has now been said as to the plaintiff's right to costs, where the *postea* is given to the defendant, seems to be contradicted in some degree by the following cases:—To trespass, the defendant pleaded, 1st, the general issue; and, 2dly, a special plea, to which the plaintiff replied a prescriptive right; and issue was thereupon joined. There was a verdict for plaintiff with 1s. damages on the general issue, and for the defendant on the second issue; but the latter going to the whole cause of action, the Court held that the plaintiff was not entitled to costs (*l*). The other case above alluded to was thus:—To an action for criminal conversation, the defendant pleaded the general issue and the statute of limitations, and succeeded upon a demurrer to the latter plea, but the plaintiff had a verdict on the general issue; the Court held that the defendant was entitled to his costs on the demurrer, but that neither party should have costs of the issue in fact (*m*). The statute, however, does not operate so as to give full costs to the plaintiff in the case of double pleading, where the damages are under 40s. and the Judge certifies under the stat. 43 EL. c. 6, before mentioned (*n*), even although all the issues be found for him (*o*). The certificate mentioned by the *stat. of Ann.* may be given out of court.

(*f*) *Ragg v. Wells*, 8 Taunt. 129; *Cross v. Johnson*, 9 B. & Cres. 613.

(*g*) *Semble*; see *Kirk v. Nowell*, 1 T. R. 216.

(*h*) *Duberley v. Page*, 2 T. R. 391; *Jones v. Davies*, Barnes, 141; *Hullock*, 100—108; *Bennett v. Coster*, 1 B. & B. 465.

(*i*) *Dodd v. Joditrell*, 2 T. R. 235.

(*k*) *Cartwright v. Cook*, 1 Dowl. P.C. 529; *Richards v. Cohen*, Id. 533; *Brooke v. Willett*, 2 H. Bla. 435; *Vollum v. Sampson*, 2 B. & P. 368. But see *Other v. Calvert*, 1 Bingh. 275, in which it was considered that the costs in these cases were merely the costs of the pleadings

which form the issue upon which the plaintiff has succeeded, excepting in replevin only.

(*l*) *Vivian v. Blake*, 11 East, 263. See *Edwards v. Bethel*, 1 B. & Ald. 254; *Other v. Calvert*, 8 Moore, 239, 1 Bingh. 275, S. C.; *Bennett v. Coster*, 4 Moore, 110, 1 B. & B. 465, S. C., and so in an action for a libel, *Alexander v. Lawson*, K. B. H. T. 1829.

(*m*) *Cooke v. Sayer*, 2 Bur. 753; but see *Duberley v. Page*, 2 T. R. 391; and see *Cook v. Green*, 5 Taunt. 594.

(*n*) *Howard v. Cheshire*, Say, 200.

(*o*) *Richmond v. Johnson*, 7 East, 583.

What has now been said, however, as to costs, where there is double pleading under the statute of Anne, must be considered as applicable only to cases where the defendant succeeds upon a plea which goes to the whole declaration; if he succeed on a plea which only goes to part, and the plaintiff succeed on any other part of the declaration, the plaintiff will be entitled to the *postea* and his general costs, according to the rule first above laid down. So, where the defendant pleads several pleas, each going to the whole of the declaration, and the plaintiff new assigns upon one of the pleas: as the new assignment must be considered in the nature of a new count, if the defendant do not succeed, as well upon some plea which is a bar to the whole of the new assignment, as upon a plea which is a bar to the declaration, the plaintiff will in like manner be entitled to the *postea* and the general costs. (*See ante*, 857, 863).

*Where there are several defendants.*] As to the costs in this case, *see ante*, 861, 862.

*Plea in abatement.*] As to the costs in this case, *see ante*, 473.

*Feigned issues.*] As to the costs on, *see Vol.* 1, 465.

*Ejectment.*] As to the costs in ejectment, *see ante*, 550—568.

*Replevin.*] As to the costs in replevin, *see ante*, 593.

*Scire facias.*] As to the costs in *scire facias*, *see ante*, 615.

*Actions by and against particular persons.*] As to costs in actions against hundredors, *see ante*, 628.

As to costs in proceedings against bail, *see Vol.* 1, 170, 415.

As to costs in actions by or against executors or administrators, *see ante*, 666; and *see 2 Bac. Abr. Costs*, E. 1; *Hullock*, 185—212; *Bul. N. P.* 331.

As to costs in actions by the assignees of a bankrupt, *see ante*, 684, 688.

As to costs in actions by or against infants, *see ante*, 675, 677; *Hullock*, 229—232.

As to costs in actions by paupers, *see ante*, 698; and *see Hullock*, 221—229; 3 *Bac. Abr. Costs*, E. 4.

And as to costs in actions against justices of peace, constables, officers of excise or customs, &c. *see ante*, 694; and *Bul. N. P.* 332; 2 *Bac. Abr. Costs*, E. 2; *Hullock*, 233—267.

*Interlocutory proceedings.*] As to costs on plea *puis darrien continuance*, *see Vol.* 1, 289.

As to costs upon reversing an outlawry, *see ante*, 713; and *see Hullock*, 608—611.

As to costs, after the removal of causes from inferior courts, *see ante*, 723.

As to costs of interrogatories, *see Vol.* 1, 253.

As to costs upon the payment of money into court, *see ante*, 738; *Hullock*, 349—367.

As to costs upon staying proceedings, *see ante*, 745.

As to costs upon relief against adverse claims, *see ante*, 760, 761.

As to costs of a particulars of demand, *see ante*, 773.

As to costs upon setting aside proceedings for irregularity, *see ante*, 785.

As to costs upon a judgment of nonpros, *see ante*, 792.

As to costs upon a discontinuance, *see ante*, 793, 794.

As to costs upon entering a *cassetur breve*, *see ante*, 796.

As to costs upon putting off the trial, *see ante*, 800.

As to costs upon judgment as in case of a nonsuit being obtained, *see ante*, 809. They are of course the same as upon a nonsuit. *See ante*, *Vol.* 1, 302.

As to costs for not proceeding to trial, *see ante*, 803.

As to costs upon entering a *nolle prosequi*, *see ante*, 813.

As to costs upon a new trial being granted, *see ante*, 827; *Hullock*, 356—401; and *see Chapman v. Partridge*, 2 *New Rep.* 382; *Bird v. Appleton*, 1 *East*, 111.

As to the costs upon a *venire de novo* being awarded, *see ante*, 829.

As to costs on a judgment *non obstante veredicto*, *see ante*, 830.

As to costs upon amendment, *see ante*, 832, &c.; and *see Hullock*, 340—348.

And as to costs upon judgment being arrested, *see ante*, 853.

It may be here observed that interlocutory costs may be set off against final costs, where the payment of them at the time they are adjudged is not strictly a condition to *ulterior* proceedings (*p*).

*Double and treble costs.*] Only single costs were allowed by the statute of Gloucester; but double and treble costs have since, in some cases, been given expressly by statute. Also, where a statute gives double or treble damages, where damages were before recoverable, the plaintiff shall also have double or treble costs (*q*). And in all cases, not only the costs given by the jury shall be doubled or trebled, but also the costs *de incremento* (*r*). In an action upon a statute which gives double costs, if a new trial be granted, nothing being said on the subject of costs, the party who succeeds on both trials is entitled to double costs of both (*s*).

By double or treble costs, however, are meant, not double or treble the single costs; the true mode of estimating the amount of the dou-

(*p*) *Doe d. Carter*, 1 *M. & Scott*, 516, 8 *Bingh.* 339, *S. C.*; *Aspinall v. Stamp*, 3 *B. & C.* 108, 4 *D. & R.* 716, *S. C.*; *ante*, *Vol.* 1, 55, 437.  
(*q*) 2 *Bac. Abr. Costs*, *C.*; *Bul. N. P.*

334. *See Butters v. Furber*, 1 *B. & B.* 517.

(*r*) *Smith v. Duncie*, 2 *Str.* 1048.

(*s*) *Loader v. Thomas*, 1 *C. & J.* 54.



*ble costs* is, first to allow the prevailing party the single costs, including the expenses of witnesses, counsel's fees, &c., and then allow him one half of the amount of the single costs, without making any deduction on account of counsel's fees, &c. (*t*). *Treble costs* consist of the single costs, half of the single costs, and half of that half (*u*).

Where a statute requires a Judge's certificate to entitle the party to double or treble costs, such certificate need not in general be given immediately after the trial of the cause (*v*).

*Remedy, &c. for and taxation of costs.*] As to an attorney's remedy for costs, *see Vol. 1, 51*. And as to the taxation of costs, *see Vol. 1, 318, 319, 48, 51*.

Setting-off costs against costs, &c., *Vol. 1, 57, 437, 438*.

As to security for costs, *see ante, 762*.

(*t*) *Staniland v. Ladiam*, 4 B. & C. 888, 7 D. & R. 884, S. C.

(*u*) *Hullock*, 484. *See Phillips v. Ba-*

*con*, 1 Chit. Rep. 137, n.; *Buckle v. Bewes*, 6 D. & R. 1, 4 B. & C. 154, S. C.

(*v*) *Norman v. Danger*, 3 Y. & J. 203.

## CHAPTER XXXI.

## ENTRY OF SUGGESTIONS UPON THE ROLL.

WHEREVER, by the provision of an act of parliament or otherwise, a person not a party to the record is to be affected by a judgment, or where the judgment upon the record is to be such as would not be ordinarily warranted by the previous proceedings on the record, the proper course is to enter a suggestion on the roll, so that the party to be affected by it may demur, if he thinks the facts suggested are insufficient in point of law, or to plead if he means to deny them (a).

*As to the awarding of the venire.*] If the sheriff be interested in the event of the cause, or related by blood or affinity to either of the parties, a suggestion to this effect may be entered on the issue, immediately before the award of the *venire*; and the *venire* is then awarded to the other sheriff, if there be two (b), or if there be but one, then to the coroner (c); or if the coroner be interested, &c. then to two persons appointed by the Court, called *elizors* (d). Any matter may be thus suggested, which would be a good principal challenge to the array of the jury. (*See upon this subject, Vol. 1, 292.*)

In local actions in the superior Courts, by the 3 & 4 W. 4, c. 42, s. 22, after reciting that "unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen;" it is enacted, "that in any action depending in any of the said superior Courts, the venue in which is by law *local*, the Court in which such action shall be depending, or any Judge of any of the said Courts, may, on the application of either party, order the *issue* to be tried, or *writ of inquiry* to be executed, in *any other county* or place than that in which the venue is laid; and for that purpose any such Court or Judge may order a *suggestion* to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the same is ordered to take place" (e). The application to the Court or a Judge for this purpose should be supported by an affidavit, shewing the unnecessary delay or expense that will take place by the trial or execution of the writ of inquiry in the county in which the action is brought.

So, in local actions, where a fair and impartial trial cannot be had in the county where the venue is laid, the Court, upon a proper case

(a) See *Barlett v. Pentland*, 1 B. & Adol. 704.

(b) *Rez v. Warrington*, 1 Salk. 152; *Letom v. Beckley*, 5 M. & Sel. 144.

(c) *Fortesc. de laud. LL. c. 25; Co.*

*Litt. 158.*

(d) *Id.*; *Holland v. Heron, Barnes*, 465. See forms of such suggestions, *Chit. Forms*, 728.

(e) See the forms, *Chit. Forms*, 729.

being stated to them by affidavit, will upon motion grant leave to enter such a suggestion upon the issue, with a *nient dedire*, in order to have a trial in the next adjoining county (*f*); and it seems to be immaterial whether the next adjoining county be a county palatine, or not (*g*). The affidavits upon which such an application is founded should specify the facts from which it is to be inferred that a fair trial cannot be had in the county where the venue is laid (*h*). In transitory actions, it is more usual to move for leave to change the venue. (See *ante*, 726). Also, in actions transitory or local, depending in any of the courts at Westminster, where the venue is laid in the county of any city or town corporate in England, (with the exception of London, Westminster, Bristol, Chester, and the borough of Southwark), the Court, upon the application of either party, may, if they think proper, award the venire, &c. to the sheriff of the county next adjoining to the county of such city or town corporate, in order that the action may be there tried. (38 G. 3, c. 52, ss. 1, 10) (*i*), and it should seem that this would be the case, even although the venue has been changed to the city upon the usual affidavit (*k*).

Where the venue is laid in Berwick-upon-Tweed, or other place where the king's writ of venire does not run, then upon a suggestion that the issue ought to be tried in the next adjoining English county, the venire is awarded to the sheriff of such county accordingly (*l*); thus, where the venue is laid in Berwick-upon-Tweed, the venire upon suggestion may be awarded to the county of Northumberland (*m*); and the like (*n*). It should seem that the Welsh Judicature Act, the 5 G. 4, c. 106, ss. 21, 22, which relates to the plaintiff's being nonsuited, and paying costs to the defendant in transitory actions for debts, &c. under 50*l.* brought in the courts at Westminster, where the cause of action arose in Wales, and the defendant was resident there at the time of serving the writ, is, with its other provisions, virtually repealed by the 1 W. 4, c. 70 (*o*).

In all cases, where either party would suggest any special matter, as to the awarding of the venire out of the common course, a copy should be given to the opposite party, and he should be allowed a reasonable time to consider of it, before a *nient dedire* is entered (*p*).

The suggestion should always be made at the proper stage of the

(*f*) *Res v. Harris*, 3 Bur. 1333; *Res v. Amery*, 1 T. R. 363; *Res v. Hunt*, 3 B. & Ald. 444.

(*g*) *Res v. The Inhabitants of St. Mary*, 7 T. R. 735.

(*h*) *Res v. Harris*, 3 Bur. 1333. See form of the suggestion, and award of venire into the adjoining county, Chit. Forms, 729.

(*i*) See *Res v. Inhabitants of St. Mary*, 7 T. R. 735. See the form of the suggestion in such a case, and award of venire into the adjoining county, Chit. Forms, 729.

(*k*) *Bird v. Morse*, 7 Taunt. 365.

(*l*) See the former decisions as to when the venue was in Wales. *Goodright d. Richards v. Williams*, 2 M. & Sel. 270; and see *Ambrose v. Rees*, 11 East, 370; *Res v. Cowle*, 2 Bur. 855.

(*m*) *Mayor of Berwick v. Ewart*, 2 W. Bl. 1036.

(*n*) See also *Way v. Yally*, 2 Salk. 651; and see form of suggestion and award of venire, Chit. Forms, 123, No. 16.

(*o*) See *vide* Tidd's Sup. 167, and cases there.

(*p*) *Brocas v. London, City of*, 1 Str. 235.

proceedings, when the fact which gave rise to the necessity for making the suggestion took place.

*Of breaches in debt on bond.*] As to the suggestion, &c. in this case, see *ante*, 522 to 527.

*Of the death of parties.*] Where there are two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to or against the survivors, the action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of or against the survivors. (8 & 9 W. 3, c. 11, s. 7). The death, in this case, if it occur before issue joined, is suggested at the commencement of the next pleading, and of course appears upon the face of the issue when made up. But if it happen after issue joined, it seems that it is not necessary that it should be suggested upon the *nisi prius* record; if suggested upon the issue roll, it will be sufficient (*q*). Even after motion to set aside proceedings for irregularity, because one of two plaintiffs died before interlocutory judgment, and the suit proceeded to execution in the names of both, the Court allowed the surviving plaintiff to suggest the death of the other on the roll, and to amend the *ca. sa.* without payment of costs (*r*).

If the death happen after final judgment, then, upon suggesting the death upon the roll, you may sue out execution by or against the survivor (*s*); or you may sue out execution in the names of all, but it can be executed as against the survivor only (*t*). The lands, however, of a deceased defendant are still liable in satisfaction of the judgment, although he leave others of the defendants surviving him; for the judgment survives as to the personalty only, and not as to the realty; (*Vol.* 1, 405); and, therefore, if the plaintiff wish to sue out an *elegit* against the lands of a deceased defendant, as well as against the survivor, he may have a *scire facias* against such survivor and the heir and terretenants of the deceased, to have execution against the lands and goods of the former, and the lands of the latter. (*Ante*, 602).

If one of several defendants in error die, upon suggesting the death upon the roll, you may proceed against the survivors. (*Vol.* 1, 333) (*u*).

*For costs.*] Where the effect of an act or parliament is to alter the law in respect of giving costs to a defendant in a case where the plaintiff, in ordinary circumstances, would be entitled to them, the proper course is to enter a suggestion on the roll of the facts necessary to entitle the defendant to those costs; so that the plaintiff may de-

(*q*) *Farr v. Denu*, 1 Bur. 363.

(*r*) *Newnham v. Law*, 5 T. R. 577.  
See forms of suggestions of death before issue joined, Chit. Forms, 731; after issue joined, *Id.* 732.

(*s*) *Withers v. Harris*, 2 Ld. Raym.

808; and see *Pennoir v. Brace*, 1 Salk. 319, 1 Show. 404, 1 Ld. Raym. 244, S.C.

(*t*) 2 Saund. 50 k, 72 k, o; *ante*, 601; Vol. 1, 322, 374, 376.

(*u*) See a form of the suggestion, Lill. Ent. 217.

mur, if the defendant do not set forth the facts which bring the case within the act of parliament, or may traverse those facts if they be untrue (*x*).

If an action be brought in this Court for a cause of action which might have been sued for in the court of requests, or court of conscience of any city, borough, or town, there is usually a clause in the statute creating the jurisdiction of the inferior court, by which it is provided, that, if the plaintiff here recover any sum within the limits of the cognizance of the inferior court, he shall not be entitled to costs; or, if the defendant have a verdict, he shall be entitled to double costs (*y*). It would be impossible in a work of this description to enumerate the provisions of this nature in all the statutes which establish courts of conscience; all that is here intended is to state some general principles, which the courts seem to have established upon the subject, and which are applicable to all these courts of conscience, unless expressly controlled by the words of the statute creating their jurisdiction, or by necessary implication. All these statutes have one common object, and should all, as far as possible, receive a uniform construction (*z*).

If the statute creating the court of conscience contain a prohibitory clause, declaring that no action shall be brought elsewhere for the causes of action therein mentioned, the statute in such a case may be offered as a defence upon the general issue (*a*), or it may be pleaded (*b*). But if the defendant omit to take advantage of the statute in either of these ways, the Court will not, after verdict, either allow a suggestion of the defendant's residing within the jurisdiction of the inferior court to be entered on the roll, nor will they stay the proceedings (*c*). On the other hand, where the statute contains no such prohibitory clause, it cannot be pleaded; but the mode of taking advantage of it is, by the defendant's moving, after verdict or execution of writ of inquiry, and before final judgment (*d*), (upon affidavit stating his residence within the inferior jurisdiction, that he is liable to be warned or summoned to the inferior court, together with such other circumstances as may be necessary to bring him within the statute), for leave to enter a suggestion to that effect upon the record (*f*); or he may move the Court to stay the proceedings, upon payment of the sum recovered, without costs (*g*). The application must not be made *before* (*h*) verdict, but must be promptly after it, or after the ex-

(*x*) *Hickman v. Colley*, 2 Str. 1120; *Bartlett v. Pentland*, 1 B. & Adol. 710.

(*y*) See the forms of suggestions, &c., Chit. Forms, 735, 736.

(*z*) *Shadduk v. Bennett*, 7 D. & R. 232.

(*a*) *Parker v. Elding*, 1 East, 352.

(*b*) *Taylor v. Blair*, 3 T. R. 452; *Anslee v. Lilley*, 1 M. & R. 564.

(*c*) *Taylor v. Blair*, 3 T. R. 452.

(*d*) *Culvert v. Everard*, 5 M. & Sel. 510.

(*e*) See a form, Chit. Forms, 734.

(*f*) *Barney v. Tubbs*, 2 H. Bl. 352; *Fitzpatrick v. Pickering*, 2 Wils. 68; *Watson v. Cook*, 2 M. & Sel. 348. See *Harley v. Lloyd*, 4 M. & Sel. 171; *Swinglehurst v. Altham*, 3 T. R. 139.

(*g*) *Dunster v. Day*, 8 East, 239; *Cornforth v. Lowcock*, 1 M. & R. 321; and see *Baldon v. Pitter*, 3 B. & Ald. 210; 1 Chit. Rep. 636, notes.

(*h*) *Meredith v. Drew*, 8 Bingh. 142, 1 M. & Scott, 225, 1 Dowl. P. C. 252, S. C.

execution of the writ of inquiry, in case of a judgment by default; it is too late to make it in the term after judgment signed and execution levied, if it could have been made in that term (i). Where a Judge at the assizes, in pursuance of the 1 W. 4, c. 7, (*ante*, Vol. 1, 316), orders that the plaintiff shall have execution within a limited time, and judgment is thereupon entered and execution issued, the defendant is not precluded from applying in the next term to the Court above to enter a suggestion to deprive the plaintiff of costs; a Judge at the assizes has no power to order such a suggestion to be entered (j). The motion for leave to enter a suggestion is for a rule to shew cause why the plaintiff should not bring the *postea* into court and file the plea roll, so that the defendant may enter a suggestion thereon, &c. and that all proceedings be stayed in the mean time. *Deliver a brief motion paper to counsel, accompanied with the affidavit* (k). The affidavit must clearly bring the case within the act (l). *On the rule nisi being obtained, draw it up with the clerk of the rules, and serve a copy upon the plaintiff's attorney, at the same time shewing him the original; and then proceed to make the rule absolute upon affidavit of service. As soon as it is made absolute, get the suggestion drawn by counsel or pleader* (m); *indorse it upon the nisi prius record, and get the clerk of the treasury to enter it upon the roll. If the statute give the defendant costs, give notice to the plaintiff's attorney of the time of taxing them; bespeak the roll of the clerk of the treasury, and attend before the master with the postea, who will thereupon tax the costs, and mark them upon the postea and roll. If the roll has not been carried in, and the plaintiff refuses to carry it in, then apply to the Court by motion, or to a Judge on summons, to compel him to deliver it up to you in order to enable you to enter the suggestion thereon. It affords no answer to such an application, that the plaintiff's attorney has absconded with it, or the like* (n). This suggestion may be traversed or demurred to by the plaintiff (o).

The courts of conscience are in general restrained to debts or other demands certain, capable of being ascertained by mere computation (p). Consequently in all other cases, as for instance in an action on the case for negligence in driving a carriage (q), or in a special action of assumpsit for the breach of an agreement (r), or the like, the defendant cannot plead the statute, nor will the Court allow him to

(i) *Wathorn v. Cook*, 2 M. & Sel. 348; and see *Hippesley v. Layng*, 4 B. & C. 863, 7 D. & R. 265, S. C.

(j) *Baddley v. Oliver*, 1 Dowl. P. C. 598.

(k) See form of affidavit, Chit. Forms, 734.

(l) *Newton v. Peacock*, 1 Dowl. P. C. 677.

(m) See forms, Chit. Forms, 735, 736.

(n) See *Jones v. Harris*, 1 Dowl. P. C. 433.

(o) *Jefferies v. Watts*, 1 New Rep. 157; Andr. 380; *Barney v. Tubb*, 2 H. Bl. 354; and see *Hickman v. Colley*, 2

Str. 1120; *Bartlett v. Pentland*, 1 B. & Adol. 710.

(p) *Jonas v. Greening*, 5 T. R. 529; *Fornin v. Oswell*, 1 M. & Sel. 393. See *Foot v. Coare*, 2 B. & P. 588, 29; *Sandby v. Miller*, 5 East, 194; *Re v. Commissioners of London Court of Requests*, 7 East, 292; *Holden v. Newman*, 13 East, 161; *M'Colham v. Carr*, 1 B. & P. 223; 1 Doug. 245.

(q) *Lawson v. Moggridge*, 1 Taunt. 396. See *Melton v. Garment*, 2 N. R. 84.

(r) *Jonas v. Greening*, 5 T. R. 529. See *Fornin v. Oswell*, 1 M. & Sel. 393.

enter a suggestion upon the record, however trifling the damages may be (*s*). It is in general necessary, also, in order to sue in these courts of conscience, that the cause of action have arisen, and the defendant or plaintiff or both, reside within the jurisdiction (*t*); but this depends entirely upon the wording of the statute in each particular case, and sometimes it may be otherwise (*u*). And it is the amount of debt or damages found by the jury, and not as laid in the declaration, which is to determine whether it might have been sued for in the inferior court or not (*v*); and although reduced below the limited sum by a payment in part (*x*), or by the plea of the statute of limitations (*y*), or by the plea of infancy or other defence set up to the action (*z*), it is in general within the statute; but otherwise, if reduced by a set-off (*a*), or tender (*b*), if pleaded.

Executors and administrators, as defendants, are not in general within any of these statutes (*c*); nor attorneys, either as plaintiffs or defendants, unless specially named therein (*d*); unless, perhaps, an attorney plaintiff sue an attorney defendant (*e*). But assignees of a bankrupt are (*f*).

If a defendant be entitled to double or treble costs on a verdict for him, because sued for something done by virtue of his office of justice of peace, constable, officer of excise or customs, &c. (see *ante*, 694), if it do not appear upon the face of the record that the action was brought against him as such officer, for something done by him in the execution of his duty, then, upon obtaining a certificate to that effect from the Judge, at or after the trial (*g*), or, in case of a nonsuit

(*s*) See *Drew v. Fletcher*, 1 B. & C. 283.

(*t*) *Welsh v. Troyte*, 2 H. Bl. 29; *Tubb v. Woodward*, 6 T. R. 175; *Smith v. O'Kelly*, 1 B. & P. 76; *Dillamore v. Cappon*, 1 Bingh. 388.

(*u*) See *Busby v. Fearon*, 8 T. R. 335; *Barney v. Tubb*, 2 H. Bl. 352; *Jonas v. Greening*, 5 T. R. 529; *Rex v. Danser*, 6 T. R. 242; *Harwood v. Lester*, 3 B. & P. 617; *Baildon v. Pitter*, 3 B. & Ald. 210; *Reeves v. Stroud*, 1 Dowl. P. C. 390. As to what is seeking a livelihood, &c., within the meaning of the London court of conscience act, see *Double v. Gibbs*, 1 Dowl. P. C. 583, and cases there cited; *Rice v. Legh*, 2 Id. 105.

(*v*) *Barnes v. Winkler*, 2 C. & F. 345; *Baddley v. Oliver*, 1 Dowl. P. C. 598, and cases there cited in notes; *Moore v. Jones*, 2 Dowl. P. C. 58; *Younger v. Wilsby*, 6 Taunt. 542; *Weston v. Donnelly*, Say. 273; *Drew v. Coles*, 1 Dowl. P. C. 580; *Baildon v. Pitter*, 3 B. & Ald. 210; *Graham v. Browne*, 2 C. & J. 327; and see *Shaddick v. Bennett*, 7 D. & R. 229, 4 B. & C. 769, S. C.

(*x*) *Walker v. Watson*, 8 Bingh. 414; *Clark v. Askew*, 8 East, 28; *Horn v. Hughes*, Id. 347; *Fountain v. Young*, 1 Taunt. 60. See *Porter v. Philpot*, 14

East, 344; *M'Collam v. Carr*, 1 B. & P. 223; *Harsaut v. Larkin*, 3 B. & B. 257; *Abbey v. Lill*, 5 Bingh. 299, 2 M. & P. 534, S. C.

(*y*) *Lord Huntingtower v. Heely*, 7 D. & R. 369; *Rotheray v. Munnings*, 1 B. & Adol. 18 a.

(*z*) *Bateman v. Smith*, 14 East, 301.

(*a*) *Pitts v. Carpenter*, 2 Str. 1191; *Gross v. Fisher*, 3 Wils. 48; and see *Gobed v. Birt*, 2 Chit. 394; *Cottle v. Langman*, 9 Moore, 625; *Jones v. Harris*, 1 Dowl. P. C. 374. *Aliter*, if the set-off be not pleaded, Id.

(*b*) *Heaward v. Hopkins*, 2 Doug. 448; *Waistell v. Atkinson*, 3 Bingh. 289, 11 Moore, 14, S. C. But see *Jordan v. Strung*, 5 M. & P. 196, *semb. cont.*

(*c*) *Ailway v. Burrows*, 1 Doug. 263. See *Wase v. Wyburd*, Id. 246.

(*d*) *Wiltshire v. Lloyd*, 1 Doug. 381; 7 East, 47; *Johnson v. Bray*, 5 Moore, 622, 2 B. & C. 698, S. C.; *ante*, 632.

(*e*) See *Burn v. Pasmore*, 1 Dowl. P. C. 17.

(*f*) *Keay v. Rigg*, 1 B. & P. 11; *Ward v. Abrahams*, 1 B. & Ald. 367.

(*g*) *Harper v. Carr*, 7 T. R. 448, 1 Doug. 307, 308, n. S. C.; *Devenish v. Mertins*, 2 Str. 974; and see *Atkins v. Banwell*, 3 East, 92.

or nonpros, upon his making an affidavit of the fact, the Court will allow him to enter a suggestion (*h*) of it upon the record (*i*). And the same in all other cases where the defendant is entitled to double or treble costs (*k*).

And lastly, where the plaintiff does not recover the amount for which he has holden the defendant to bail, the defendant shall be entitled to costs, if upon motion for that purpose, and upon hearing the parties by affidavit, it shall appear to the Court that there was no reasonable or probable cause for holding the defendant to bail for that amount. (43 G. 3, c. 46, s. 3) (*l*).

(h) See a form, Chit. Forms, 737.

*Bate v. Hodgetts*, 1 Bingh. 182.

(i) *Barton v. Miles*, Hardw. 125; Ca. Pr. C. B. 16.

(l) See this statute, *ante*, 859, and see the cases there cited. See the form of suggestion, Chit. Forms, 737.

(k) See *Collins v. Poney*, 9 East, 322;



## CHAP. XXXII.

## DEATH, BANKRUPTCY, &amp;c. OF PARTIES.

*Death of parties.*] BEFORE we consider the effect the death of a party has upon a suit, it will be necessary to ascertain what actions survive to or against their executors or administrators.

*Actio personalis moritur cum persona*, is a rule that admits of many exceptions (a). 'All such personal actions as are founded upon any obligation, contract, debt, covenant, or any other duty to be performed, survive, and do not die with the person, but may by the common law be brought by or against the personal representatives of the deceased parties (b). Account did not lie at common law for or against an executor, &c.; but it is given to executors by *stat. Westm. 2nd* (13 Ed. 1), *st.* 1, c. 23, and against executors by 4 & 5 A. c. 16, s. 27. So, debt on simple contract did not lie against an executor (c); unless on a contract made by him in his representative capacity (d); but debt for rent, and assumpsit upon the simple contract of the testator always did (e). And now, by the recent act, 3 & 4 W. 4, c. 42, s. 14, "an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator." An executor may support debt for not setting out tithes (f).

So, replevin or detinue will lie for or against executors, where the goods taken away continue still in specie in the hands of the wrong-doer, or of his executor (g); or, if they be consumed, then an action for money had and received, to recover the value (h). So, where the goods of a testator have been carried away in his life-time, the executor may afterwards maintain trespass against the wrong-doers; (4 Ed. 3, c. 7); and the same as to administrators, (31 Ed. 3, c. 11), and executors of executors. (25 Ed. 3, c. 5). These statutes are construed as giving the same remedies to executors, &c. for injuries to the *personal* estate that the deceased might have had (i); so that they may have trespass or trover (k), action for a false return (l), action for an escape (m), action for removing goods taken in execution, before the landlord (the testator) was paid a year's rent (n), action

(a) See 1 Chit. Pl. 5th ed. 78.

(b) Latch, 168; *Perkinson v. Gilford*, Cro. Car. 540; *Hambly v. Trott*, Cowp. 375.

(c) Co. 87; *Hambly v. Trott*, Cowp. 375.

(d) *Riddell v. Sutton*, 2 M. & P. 345, 5 Bingh. 200, S. C.

(e) 9 Co. 17 b; Plowd. 180.

(f) 1 Sid. 88; 1 C. & J. 437; 2 Eagle,

307.

(g) W. Jon. 173.

(h) *Hambly v. Trott*, Cowp. 377.

(i) Latch, 168.

(k) 5 Co. 27 a; W. Jon. 174.

(l) *Williams v. Cary*, 4 Mod. 403.

(m) *Berwick v. Andrews*, 2 Ld. Raym. 973.

(n) *Palgrave v. Windham*, 1 Str. 212.

against an attorney for negligence (o), or any other action of the like kind, for injuries done to the personal estate of the testator in his lifetime (p). But these statutes do not extend to injuries done to the person of the testator; and therefore an executor shall not have an action for assault and battery, false imprisonment, or slander, or other actions of the like kind (q). Nor can an executor be sued, where the cause of action is founded upon a tort to the person where the plea must be not guilty, such as false imprisonment, assault and battery, and slander (r).

The above statutes of 4 Ed. 3, c. 7, and 31 Ed. 3, c. 11, and 25 Ed. 3, c. 5, did not extend to injuries done to the freehold of the testator, and therefore an executor could not sue for diverting a watercourse, obstructing lights, cutting trees, or other actions of the like kind (s). And an executor could not be sued where the cause of action was founded upon any malfeasance or nonfeasance, or where it was a tort or arose *ex delicto*, such as trespass for taking goods, &c. trover, deceit, escape, and many other cases of the like kind, where the declaration imputes a tort done to person or property of the plaintiff by the deceased, and the plea must have been not guilty (t). Yet if the plaintiff's goods were taken away by the testator, and still continued in specie in the hands of the executor, replevin or detinue would always, as it still will, lie against the executor (u); or, if they be consumed, then an action for money had and received, to recover the value (x). And now, by the 3 & 4 W. 4, c. 42, s. 2, reciting, that "there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal; for remedy thereof" it is enacted, "that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his pro-

(o) *Knights v. Quarles*, 2 B. & B. 103, 4 Moore, 532, S. C.

(p) See also *Rutland v. Rutland*, Cro. El. 377; *Emerson v. Emerson*, 1 Vent. 187; W. Jon. 174; *Berwick v. Andrews*, 2 Ld. Raym. 974.

(q) W. Jon. 174; Latch, 168; *Emerson v. Emerson*, 1 Vent. 187.

(r) W. Jon. 174; Latch, 167, 168; *Hole v. Bradford*, T. Raym. 57; Palm.

330; *Perkinson v. Gifford*, Cro. Car. 540; *Kinsey v. Heyward*, 1 Ld. Raym. 433; *Hambly v. Trott*, Cowp. 375.

(s) W. Jon. 174; Latch, 168; *Emerson v. Emerson*, 1 Vent. 187.

(t) See the cases cited in note (p), *supra*.

(u) W. Jon. 173, 174.

(x) *Hambly v. Trott*, Cowp. 377.

perty, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person." It will be observed, that this enactment is with some limitations, and does not extend to injuries to the person.

*Death before verdict or judgment by default.*] If a sole plaintiff or defendant die before verdict or judgment by default, the action abates, and the plaintiff or his executor is obliged to commence a new action against the defendant or his executor, provided the cause of action survive to or against the executor (y). In an action by husband and wife for money lent by the wife before marriage, the death of the wife before trial was holden to abate the suit (z). But where a person admitted to defend alone as landlord in ejectment died before trial, having devised all his real estates to J. S., and the statutes of limitations prevented the lessor of the plaintiff from bringing a fresh ejectment, the Court, upon application, gave the lessor of the plaintiff leave to sign judgment against the casual ejector in the old suit, unless J. S. would appear and defend the action as landlord (a).

But where there are several plaintiffs or defendants, and some of them die, if the cause of action survive to or against the others, the action does not abate; but the death being suggested upon the roll, the action proceeds by or against the survivors. (*Ante*, 871).

*Death after verdict and before final judgment.*] If a sole plaintiff or defendant die after verdict, and before final judgment, the action is not thereby abated; but final judgment is signed as if the party were alive, and then revived by *scire facias* by or against the executor, &c. (17 Car. 2, c. 8; *ante*, 603). The action would not in this case be abated, although it were for a cause of action, as for a libel, &c. which could not be originally brought by an executor (b). So, if one of several plaintiffs or defendants die after verdict and before judgment, the action does not abate; but the death being suggested on the roll (c), judgment is entered by or against the survivors, and execution sued out accordingly. (*Ante*, 604).

Although the plaintiff has died after verdict, the Court may, it seems, grant a new trial on the application of the defendant, and would in such case impose terms on him to prevent his taking advantage of the plaintiff's death (d).

(y) See *Cutfield v. Coney*, 2 Wils. 83; *Wallop v. Irwin*, 1 Wils. 315; *Taylor v. Harris*, 3 B. & P. 549.

(z) *Cecchi v. Powell*, 6 B. & C. 253.

(a) *Doe d. Grubb v. Grubb*, 5 B. & C. 457.

(b) *Palmer v. Cohen*, 2 B. & Adol. 966.

See *Copley v. Day*, 4 Taunt. 702; *Toulmin v. Anderson*, 1 Id. 385; *Toussaint v. Hartop*, 7 Id. 571.

(c) See forms of suggestions, Chit. Forms, 732.

(d) *Griffiths v. Williams*, 1 C. & J. 47.

*Death, between interlocutory and final judgment.]* If a sole plaintiff or defendant die after judgment by default and before final judgment, the action shall not abate, if it be such as might originally be prosecuted by or against the executors (e); but the judgment may be revived by *scire facias*, and the parties may thereupon proceed to final judgment. (*Ante*, 604). And the Court in such a case have referred it to the master to compute principal and interest on a bill of exchange, during the same term in which the plaintiff died, without a *scire facias*; because the final judgment would be signed as of the same term, and, having relation to the first day of it, would appear to have been signed before the plaintiff's death (f).

So, if one of several plaintiffs or defendants die after judgment by default and before final judgment, the action does not abate; but the death being suggested on the roll, the action proceeds by or against the survivors (g). (*Ante*, 871).

*Death after final judgment.]* If a sole plaintiff or defendant die after final judgment, and before execution, the action is not thereby abated; but the judgment must be revived by *scire facias* by or against the executors, &c. (*Ante*, 601; and see *ante*, 660).

But where there are several plaintiffs or defendants, and some of them die after final judgment and before execution, execution may be sued out by or against the survivors, in the names of all; or, upon suggesting the death upon the roll, execution may be sued out by or against the survivors by name; or, where it is desired to have execution by *elegit* of the lands of a deceased defendant, the judgment may be revived by *scire facias* against his heir and terretenants, and against the surviving defendants, and an *elegit* thereupon sued out against the lands of the deceased, and the lands and goods of the survivors. (*Ante*, 871).

*Death after a writ of error.]* The death of a plaintiff in error, before errors assigned, abates the writ; but if it happen after the assignment of errors, it does not. (*Vol.* 1, 333). The death of a defendant in error, however, in no case abates the writ; but the death being suggested on the roll, the writ proceeds against the survivor; or if all the defendants die, the executors or administrators may be made parties by the *scire facias ad audiendum errores*. (*Vol.* 1, 333).

*Death of defendant, how far a discharge of his bail.]* If the principal die at any time before the return of the *ca. sa.*, the bail are thereby discharged; but if he have not been arrested on the *ca. sa.*, and die after it is returnable, the bail are fixed. (*Vol.* 1, 416). This, however, has reference only to bail to the action; bail in error are liable, notwithstanding the death of their principal. See also *Vol.* 1, 145

(e) See *Ireland v. Champneys*, 4 2 M. & P. 1, S. C.; *ante*, 486, 495. Taunt. 884.  
(g) See forms, Chit. Forms, 733.  
(f) *Berger v. Green*, 1 M. & Sel. 229. See *Fort v. Oliver*, 1 M. & Sel. 242.  
See *Culvert v. Tomlin*, 5 Bingh. 1, 5,

in what cases the death of the defendant is a discharge of the bail to the sheriff.

*Bankruptcy of parties.*] We have already seen how far the bankruptcy of parties abates the action, *ante*, 606.

If a defendant become a bankrupt, and obtain his certificate before his bail are fixed, the bail are thereby discharged; (*Vol.* 1, 416, 417); and the same as to bail to the sheriff. (*Id.* 137, 145, 148). And if a bankrupt be in custody in execution, and obtain his certificate, he may be discharged upon application to the Court wherein judgment was obtained, or to a Judge at chambers. (6 *G.* 4, c. 16, s. 126; *see ante*, 689). Also, before the bankrupt has obtained his certificate, a creditor at whose suit he is in custody cannot prove his debt under the commission, until he have first relinquished his action against the debtor, and all benefit whatever from the same. (6 *G.* 4, c. 16, s. 59, and *see ante*, 686). Nor can a creditor, who has taken his debtor in execution, sue out a commission of bankrupt against him for the same debt (i).

*Marriage of feme plaintiff or defendant.*] If a feme sole, plaintiff, obtain judgment, and marry before execution, a *scire facias* must be sued out in order to make the husband a party to the judgment. (*Ante*, 605). So, if a feme sole, defendant, after judgment against her, marry before execution, a *scire facias* will be necessary, in order to make the husband a party to the judgment. (*Id.*) But if a feme sole, plaintiff in error, marry pending the writ, the writ is thereby wholly abated. (*Vol.* 1, 334). As to the effect of marriage in an action in general, *see ante*, 678, 679.

(i) *Cohen v Cunningham*, 8 T. R. 123. See *M'Master v. Kell*, 1 B. & P. 302.

## CHAPTER XXXIII.

## MOTIONS AND RULES.

## SECT. 1.

*Rules granted upon Motion by Counsel.*

RULES granted upon motion by counsel, are granted either on the plea side, or on the crown side of the court. Rules for attachments are the only rules granted on the crown side, which have any relation to a civil suit; and shall be considered in a subsequent part of the work, where we shall have to treat of attachment generally.

Rules granted upon the plea side, upon motion by counsel, may be classed under the following heads: 1st, Those which are granted upon the motion paper being merely signed by counsel, without any motion being actually made in court; 2dly, Those, which are considered so much as a matter of course, that the grounds of the motion are not particularized by counsel, and where in some instances counsel may hand the motion paper to the clerk of the rules without making the motion *viva voce*; and 3dly, those which are granted, upon the grounds of the motion being particularized by counsel.

The first class of rules, namely, those which are granted upon the mere signature of counsel, are absolute in the first instance, and may be obtained thus: *Get the motion-paper signed by counsel; take it to the office of the clerk of the rules, and draw up the rule; and serve a copy of the rule upon the opposite attorney.*

The remaining two classes of rules are either absolute in the first instance, or rules to shew cause. If absolute in the first instance, they are obtained thus; *Let an affidavit be made of the facts necessary to support the application (see post, 899), annex it to the motion-paper, and indorse the latter correctly as to the nature of the rule required. Then give the motion-paper and affidavit to counsel, who, after signing it, will either give it to the clerk of the rules, or move it in court before the single Judge, sitting in pursuance of the 1 W. 4, c. 70, s. 1, according to the nature of the motion. The motion-paper and affidavit, however, must be handed in to the clerk of the rules, whether the rule be granted or refused. If the rule be granted, call in the evening at the office of the clerk of the rules, and draw up the rule, and serve a copy of it upon the attorney or agent of the opposite party. It cannot be served on a Sunday (a). It must be served at*

or before nine at night; if served after that hour the service will be bad. (*R. H. 2 W. 4, r. 50*). It is not necessary to shew the original rule, unless sight thereof be demanded, except for the purpose of obtaining an attachment. (*Id. r. 51*). As to the service of rules generally, *see Vol. 1, 29, 155*.

The affidavit upon which the motion is founded must be made before the rule is moved for, and produced in court at the time of making the motion, and must be filed or deposited with the clerk of the rules, otherwise the rule shall not be drawn up, or, if drawn up, shall be of no force or effect. (*R. H. 36 G. 3*) (b). And where an affidavit has been sworn in the afternoon before a Judge at chambers, after the rising of the full Court, the clerk of the rules will not draw up a rule nisi of that day. A party, in order to make use of an affidavit sworn or filed after he has obtained a rule nisi, must withdraw his motion and move it again (c). Sometimes, however, as in motions to stay proceedings on bail bonds, for setting aside an attachment, or against the sheriff on payment of costs, if on shewing cause it be objected that the affidavits on which the rule nisi was obtained are informal, as, on account of not swearing in a strictly formal manner to a defence on the merits, or that the application is at the instance of the bail, the Court will enlarge the time for discussing the rule, and permit a supplementary affidavit to be produced and filed (d). If you intend, in arguing the case, to rely on any affidavits in the same cause, already on the files of the Court, such affidavits must be specified in the rule nisi (e), and it may be right to mention the fact to the Court, at the time of making the motion. As to the title and jurat and other parts of the affidavit, *see post, 899, 901*.

If the rule required be a rule nisi only, give the motion-paper, with the affidavit annexed, to counsel, who will move it accordingly. The motion, unless in cases of criminal information, new trials in arrest of judgment, and other very special motions, should now in general be made before a single Judge, sitting in pursuance of the 1 *W. 4, c. 70, s. 1*. If granted, draw up the rule with the clerk of the rules, and serve a copy of it as above directed (f). It should be served a reasonable time before the time appointed for shewing cause. In some cases you cannot move on the last day of the term, as for an attachment (g); or in some cases to set aside an award (h); or to answer matters of an affidavit (i); or to stay proceedings (k). But where the subject matter of the motion has occurred at the end of the term, and the party could not complete his affidavits before the last day, and the matter is of a nature pressing for immediate decision, the Court, or the Judge sitting in pursuance of the 1 *W. 4, c. 70, s. 1*, on

(b) *See Williams v. Reeves*, 2 Chit. Rep. 218; *Ditchett v. Tollett*, 3 Price, 250; *Salloway v. Whorewood*, 2 Salk. 461.

(c) *Tilly v. Henly*, 1 Chit. Rep. 136; *Shaw v. Mansfield*, 7 Price, 709.

(d) Chit. Sum. Prac. 103.

(e) MS. E. 1624, *per Bayley, J.*; *De*

*Woolf v. —*, 2 Chit. Rep. 14.

(f) *See as to the form of a rule nisi*, Chit. Forms, 739.

(g) *Anon.* 3 Smith, 118.

(h) 1 M. & Cl. 393; *post*, 924.

(i) *Baily v. Jones*, 1 Chit. Rep. 744.

(k) *Baily v. Jones*, 1 Chit. Rep. 744; *Anon.* 2 Price, 143.

the last day of the term, would grant a rule *nisi* to shew cause in the following vacation, on an early day, (say a week or more), before a Judge at chambers (f), or direct the party to apply by summons to a Judge at chambers; and such Judge would, when justice requires it, either make an order or stay the proceedings till the next term, in order to give the party an opportunity then to move the Court. A motion for an attachment for nonpayment of costs, and against the sheriff for not returning the writ or bringing in the body, may be moved for on the last day of the term (m).

If there be any irregularity in the service of the rule *nisi*, it will be waived by the party's afterwards appearing and shewing cause against the rule (n).

The rule *nisi* thus granted, unless when moved for on the last day of the term, requires the opposite party to shew cause upon some day certain in term, usually three or four days or more (according to the distance of the opposite party's residence (o)) after it is drawn up; but where the rule is obtained the day before the last day of term, and the transaction to which it relates took place in town, it may be drawn up for the last day of term, and may be made absolute at the rising of the Court on that day. A rule *nisi* for setting aside an award, however, should not be drawn up for the last day of term, for by R. M. 36 G. 3, a counsel cannot be heard to shew cause against it on that day. (*See post*, 924).

As to when, and how far a rule operates as a stay of proceedings, see *ante*, 782. If a rule *nisi* be moved for on the last day of term, it will not operate as a stay of proceedings, nor will the Court allow the rule to be worded, so as to give it such an operation, unless perhaps under very special circumstances. (*Ante*, 882). If the rule operate as a stay of proceedings, and if any proceedings, directly or collaterally, be had in the cause, in the mean time, the Court upon application will set them aside. (*Ante*, 782). If the rule be drawn up wrong by mistake, the Court will order it to be corrected. (*Ante*, 851).

Previously to moving for a rule *nisi*, a notice of the intended motion is sometimes given to the opposite party, particularly where it is desired that the rule should operate as a stay of proceedings (p), or that time and expense may be saved by affording the adverse party an opportunity of shewing cause against it in the first instance, or where the object is to induce the Court to disallow the costs of proceedings had after such notice, and before motion (q). Where no proceedings have been had for four terms exclusive, sometimes a term's notice of motion is requisite (r).

Upon the day appointed by the rule, the opposite party must shew cause against it, unless by consent it stand over until another day in the same term. Either party, however, if not prepared to support

(f) Chit. Sum. Prac. 106.

(m) 1 Bur. 651; *Rex v. York*, 5 Bur. 2686; *Rex*, in the case of *Walker v. Whaley*, and *M'Evy v. M'Intosh*, 1 Chit. Rep. 249.

(n) Tidd, 445.

(o) Even ten days have been allow-

ed. 2 Chit. Rep. 372.

(p) *Fortescue v. Jones*, 1 Dowl. P. C. 524.

(q) Tidd, 441. See *Anon.* 1 Wils. 30; and see Chit. Forms, 739.

(r) *Tipton v. Meekes*, 8 Moore, 579.



or shew cause against the rule, may move that it be *enlarged* to a future day in the same or the next term; or to support or shew cause against it before a Judge at chambers in the vacation. It may be so enlarged, without notice to the opposite party. (*R. H. 2 W. 4, r. 97*). But it is not by any means of course that the Court should thus enlarge a rule; sufficient grounds must be stated to induce them to do so (*r*); if the application be made by the party who obtained the rule, the Court usually grant it where it is in his own delay; but not where it would have the effect of detaining the opposite party in custody, nor, in other cases, without consent or some evident necessity; if moved for by the opposite party, the Court will frequently enlarge it upon terms; or, if the rule were not served in time to give the party an opportunity of shewing cause against it, he may demand that the rule be enlarged as a matter of right (*s*). If it be enlarged to a subsequent term, it is set down in the peremptory paper, and called on in its order; (*see Vol. 1, 60*); but if it be enlarged or stand over to another day in the same term, either party may bring it on, upon the day so appointed, by moving to discharge the rule, or make it absolute. After the day mentioned in the rule, no cause can be shewn against a rule *nisi* for costs of the day (*t*).

In order to shew cause against a rule *nisi*, get an office copy of the rule, and of the affidavit (*u*) upon which it was granted; and give them, together with an affidavit when necessary, and a brief, to counsel. The affidavits should be sworn, and handed to the counsel, who is to shew cause before the day named in the rule for shewing cause; and after shewing cause, such counsel cannot come on another day in such term with better affidavits (*x*). In general, an affidavit sworn after the appointed day, but before the actual time of shewing cause, may be read for the party shewing cause (*y*); but when a particular day or time for filing affidavits is prescribed by the rule *nisi*, or, as is more frequent, in the case of enlarged rules, no affidavit filed afterwards is admissible, unless under special circumstances of inevitable accident, &c. (*R. M. 36 G. 3*) (*z*), and then a special motion should be made before the day of shewing cause for leave to file the affidavits *nunc pro tunc* (*a*). It is usual for the counsel, who is instructed to shew cause, to hand over the affidavits on his side to the opposite counsel, in a reasonable time before the day appointed for shewing cause. Upon the day appointed for shewing cause, or usually the day after, your counsel will shew cause accordingly; and the counsel for the party who obtained the rule will then be heard in reply; also, if cause be shewn in the first instance, the counsel who moved for the rule *nisi* is in like manner entitled to the reply. Although the Court will seldom hear more than one counsel upon moving for a rule *nisi*, yet, upon shewing cause, the number is not limited; and if there be two or more

(*r*) MS. E. 1814.

(*s*) Tidd, 447, 448. See *Anon.* 1 Smith, 199.

(*t*) *Scott v. Marshall*, 2 C. & J. 60.

(*u*) This seems absolutely requisite. *Brown v. Probert*, 1 Dowl. P. C. 659.

(*x*) *Kibblewhite v. Jeffreys*, 1 Chit. Rep. 142; *Tripp v. Bellamy*, 5 Price,

384; *Oakes v. Adin*, M'Clel. 582; Chit. Sum. Prac. 104.

(*y*) 1 Chit. Rep. 27 *a*; *Tully v. Henly*, Id. 136.

(*z*) *Hoar v. Hill*, 1 Chit. Rep. 27; *Harding v. Austen*, 8 Moore, 523.

(*a*) *Hoar v. Hill*, 1 Chit. Rep. 27.

counsel on either side, they are heard in the order of their precedence. After the argument is concluded, the Court deliver their opinion, and make the rule absolute or discharge it accordingly.

If no cause be shewn on the day appointed, counsel may move on the following day to make the rule absolute on an affidavit of service of the rule *nisi* (b); and if cause be not then shewn, the Court will grant a rule for making the former rule absolute (c). *Draw up this latter rule with the clerk of the rules, and serve a copy of it upon the opposite attorney or agent before nine at night.* But when the counsel who is instructed to shew cause informs the opposite counsel that he is instructed so to do, it is the usual practice for the opposite counsel not to move for the rule absolute till a subsequent day. And if, after a rule has been made absolute, it appear that counsel was instructed in time, it is usual and proper courtesy, in most cases, to open the rule and obtain back the brief, without compelling such counsel to move the Court that he may be heard; but if this be refused, the Court will order the rule to be opened (d).

The costs of the application are wholly in the discretion of the Court. When the rule *nisi* is drawn up upon payment of costs, whether cause be shewn against it or not, and whether made absolute or discharged, the Court almost always make the party who obtained the rule pay the costs. If the rule *nisi* be drawn up with costs, if no cause be shewn against it, it is made absolute with costs, as of course; if cause be shewn against it, and the rule be made absolute, the Court will make it absolute with costs, or without, in their discretion, according to the circumstances of the case; but if it be discharged, the Court almost uniformly discharge it with costs to be paid by the party who obtained it. Where the rule *nisi* is for setting aside proceedings for irregularity: if no cause be shewn against it, it is made absolute, as of course, with costs; if cause be shewn against it, and the rule be made absolute, it is made absolute almost uniformly, with costs; if discharged, it is also almost always discharged with costs to be paid by the party who obtained it, and, by *R. M. 37 G. 3*, shall be deemed to have been so discharged, even although the rule discharging it contains no special direction upon the subject. But if the rule be silent as to costs: then, if no cause be shewn, neither party is ordered to pay costs; but if cause be shewn, the rule is made absolute or discharged, with or without costs, in the discretion of the Court, according as they are of opinion that the motion ought or ought not to have been made, and ought or ought not to have been resisted (e).

There is an old rule of Court, *H. 3 J. 1*, by which it is ordered, that if a cause be moved in Court in the presence of counsel of both parties, and the Court shall thereupon make an order; no person shall afterwards cause the same to be moved contrary to such rule or order, under pain of an attachment; and the counsel, knowingly mak-

(b) See forms of affidavit, Chit. Forms, 417, 679.

(c) See the form, Chit. Forms, 740.

(d) Chit. Sum. Prac. 108.

(e) See *Anon.* 1 Chit. Rep. 390, n.;

*Tilly v. Henley*, Id. 136; and see *Hussey v. Parkin*, 1 Bingham 65; *Rex v. Sheriff of Middlesex*, in *Duncombe v. Crippe*, 2 Dowl. P. C. 5.

ing such motion, shall not be heard here in any cause during the same term. If, however, the rule have been made absolute too soon, or either party have been taken by surprise, the Court will open the rule, upon application. But they will not open a rule, merely because the affidavit upon which cause was shewn against it was false (*f*); or because counsel omitted to present to their notice a statute or other authority, which might have affected their decision (*g*).

Whether the Court grant the rule *nisi* or not, or make it absolute or discharge it, the affidavits on both sides must be filed with the clerk of the rules, as has been already mentioned. (*Ante*, 882, 884; and see *post*, 905).

It may be as well here to repeat the rule that in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Court, the same is to be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time is to be reckoned exclusively of that day also. (*R. H. 2 W. 4, r. VIII; ante, Vol. 1, 58*).

The following is an enumeration of the rules usually granted in the course of a suit, upon motion by counsel, classed under the different heads mentioned at the beginning of the present chapter.

1. *Where the Motion-paper requires only the Signature of Counsel.*

In the following cases, the rules are drawn up by the clerk of the rules, upon your producing the motion-paper signed by counsel. These rules are all absolute in the first instance.

1. Rule for a *concilium*. (*P. D. Vol. 1, 366, 370; ante, 478*).
2. — for a special jury. (*P. D. Vol. 1, 261*).
3. — that the landlord be admitted defendant, instead of the tenant, in ejectment. (*D. ante, 542*).
4. — for judgment against the casual ejector. (*P. ante, 536*).

*Note.* The letters *P. D.* annexed to the different rules above mentioned, and hereafter in the course of this chapter, signify that the rule is granted upon a motion by the *plaintiff* or *defendant*; and where both letters are used, they signify that the motion may be made by either party.

2. *Where the Motion must be made in Court, but it is sufficient if Counsel give the Motion-paper to the Clerk of the Rules..*

In the following instances, where the rules required are always granted by the Court as a matter of course, it is not necessary that

(*f*) *Davies v. Cottle*, 3 T. R. 405.

(*g*) *Dillamore v. Capon*, 8 Moore, 462, 1 Bligh. 398, S. C.

counsel should actually make the motion *viva voce* in Court; but, upon signing the motion-paper, he may at once give it to the clerk of the rules. *Call at the rule office in the evening, and draw up the rule; then serve a copy of it on the opposite attorney or agent.*

1. Rule that money deposited with sheriff instead of bail be paid over to plaintiff, no bail having been put in. (*Nisi. P. Vol. 1, 126*).
2. — that money deposited with the sheriff instead of bail be paid over to the defendant, bail having been put in and perfected. (*Nisi. D. Vol. 1, 126*).
3. — upon motion to justify bail. (*Abs. D. Vol. 1, 165, 178*).
4. — the like as to bail in error. (*Abs. P. Vol. 1, 345*).
5. — peremptory, to declare. (*Abs. D. Vol. 1, 187*).
6. — to change the venue. (*Abs. D. ante, 726*).
7. — to discharge the rule for changing the venue. (*Abs. P. ante, 729*).
8. — to refer it to the master to compute principal and interest on a bill of exchange. (*Nisi. P. ante, 521*).
9. — to have witnesses examined upon interrogatories, with consent of both parties. (*P. D. Vol. 1, 251*).
10. — for costs, for not proceeding to trial or inquiry. (*Abs. D. ante, 804*).
11. — for judgment as in case of a nonsuit. (*Nisi. D. ante, 807*).
12. — the like, after a peremptory undertaking. (*Abs. D. ante, 809*).
13. — that defendant have leave to enter a suggestion on roll, to entitle him to costs under a court of conscience act. (*Nisi. D. ante, 873*).
14. — the like, to entitle the defendant to double or treble costs. (*Nisi. D. ante, 874*).

*Note.* In the two last instances, if the defendant be not clearly entitled to the costs, or if there be any thing irregular or doubtful as to the time of making the motion, or the like, the substance of the affidavit upon which the motion is grounded should be stated to the Court.

15. — for judgment against defendants in several actions upon policies of insurance, who have entered into a consolidation rule. (*Nisi. P. ante, 735*).
16. — to make Judge's order or order of *nisi prius* a rule of Court. (*Abs. P. D. post, 906*).
17. — to make a submission to arbitration a rule of Court. (*Abs. P. D. post, 926*).
18. — to enlarge the time for making an award on consent of parties. (*P. D. post, 914*).
19. — to make a rule absolute upon affidavit of service, in cases of course, where cause is never shewn. (*P. D. ante, 885*).

*Note.* Where any of the above rules are to be drawn up by consent, the clerk of the rules must be furnished, by each of the parties,

with a motion-paper signed by counsel, before he can draw up the rule.

3. *Where the Motion is made in Court, but the grounds of it not particularized.*

In the following instances, the rules are not granted wholly of course; for which reason counsel are obliged to state shortly to the Court the grounds of the motion.

1. Rule that an attorney deliver up writings, &c. where there is no cause in Court. (*Nisi. Vol. 1, 31*).
2. — for a *habeas corpus ad respondendum*, in order to charge a prisoner, in custody on a criminal account, with a bailable writ or declaration, &c. (*Nisi. P. ante, 638, 639*).
3. — for leave to compound penal actions. (*Consent*). (*Ante, 780*).
4. — for a general special imparlance. (*Abs. D. ante, 588*).
5. — that a defendant be at liberty to waive his plea. (*Nisi. Vol. 1, 211*).
6. — that defendant be at liberty to withdraw the general issue, and plead *de novo*, with notice of set off. (*Abs. D. Vol. 1, 210*).
7. — the like, and to plead *de novo*, upon paying money into Court. (*Abs. D. Vol. 1, 210*).
8. — for leave to try before the sheriff in an action for a debt not exceeding 10*l*. (*Nisi. P. D. Vol. 1, 286*).
9. — for leave to inspect and take copies of books, court rolls, &c. and to have them produced at the trial. (*Nisi. P. Vol. 1, 238, ante, 771*). If the motion, however, be made upon behalf of a copyholder, for an inspection of the court rolls of the manor, an affidavit that the copyhold tenant has applied for, and been refused inspection, is absolute in the first instance. (*Ante, 772*).
10. — for relief by third parties, against adverse claims. (*Nisi. ante, 756*).
11. — for the like, by sheriffs. (*Nisi. ante, 759*).
12. — for leave to enter up judgment on an old warrant of attorney. (*Abs. P. ante, 498, 500*). If the warrant of attorney be 10 years old or upwards, the rule granted is a rule *nisi* only. (*Ante, 500*).
13. — for leave to sign judgment on a *scire facias*, where the party has not been summoned. (*Ante, 614*).
14. — for leave to issue a *scire facias* on a judgment not more than 10 and under 15 years old. (*Abs. P.*) If the judgment be more than 15 years old, the rule is a rule *nisi* only. (*Ante, 600, 601, 612*).
15. — to discharge an insolvent debtor, under stat. 48 *G. 3, c. 123, s. 1*. (*Nisi. D.*; sometimes it is absolute, *ante, 657, 658*).

16. Rule to make a rule absolute upon affidavit of service, no cause being shewn. (*P. D. ante*, 885).
17. — for judgment on demurrer, when not argued. (*Abs. P. D. ante*, 479).
18. — for judgment on writ of error, when not argued. (*Abs. P. D. Vol. 1*, 351).

4. *Where the Motion is made in Court, and the grounds of it particularized.*

In the following instances, the rules are not by any means granted of course; but the Court upon a full statement of the grounds of the motion, as appearing from the affidavits, will grant or refuse the rule *nisi*, at their discretion.

1. Rule that the defendant may be discharged out of custody, on entering a common appearance (*Nisi. D. Vol. 1*, 93).
2. — that the bail bond may be delivered up to be cancelled. (*Nisi. D. Vol. 1*, 93).
3. — for further time to justify. (*Abs. D. Vol. 1*, 171).
5. — for time to inquire after the bail. (*Abs. P. Vol. 1*, 173).
6. — to obtain money out of Court after judgment when paid into Court in lieu of bail. (*Nisi. P. D. Vol. 1*, 182).
8. — that an outlawry be reversed. (*Abs. D., ante*, 711).
9. — that plaintiff be at liberty to sue out a *distringas* to compel appearance or outlawry of defendant. (*Abs. P. Vol. 1*, 462).
10. — that service of declaration in ejectment, on the tenant's son or daughter, &c. on the premises, may be deemed good service. (*Nisi. P. ante*, 532).
11. — that superfluous counts, &c. be struck out of the declaration, &c. (*Nisi. D. ante*, 733).
12. — to consolidate actions, not being on a policy of insurance. (*Nisi. D. ante*, 735).
13. — that claim of consuance be allowed. (*Nisi. ante*, 725).
14. — for time to declare, under special circumstances. (*Nisi. P. Vol. 1*, 187).
15. — for leave to withdraw the general issue, and plead specially. (*Abs. D. Vol. 1*, 211).
16. — for leave to withdraw a special plea, and plead specially. (*Abs. D. Vol. 1*, 210).
17. — for leave to add a plea. (*Abs. D. Vol. 1*, 210).
18. — that a writ of inquiry may be executed before a Judge. (*Nisi. P. ante*, 513, 514).
19. — for a trial at bar. (*Nisi. P. D. Vol. 1*, 268).
20. — for a trial in a different county. (*Nisi. P. D. Vol. 1*, 217, *ante*, 369).
21. — to put off the trial. (*Nisi. P. D. ante*, 798). But when the application is made at *Nisi Prius*, the order is of course absolute in the first instance, notice of the motion and a

- copy of the affidavit being previously given to the other party.
22. — for costs against a pauper for not proceeding to trial pursuant to notice or an undertaking. (*Nisi. D. ante*, 698).
  23. — to stay proceedings in replevin, upon payment of rent, &c. (*Nisi. P. ante*, 591).
  24. — to stay proceedings in ejectment, upon payment of rent or mortgage money. (*Nisi. D. ante*, 562, 749).
  25. — to stay proceedings upon payment of debt and costs, &c. in other than ordinary cases. (*Nisi. D. ante*, 745).
  26. — to stay proceedings in second actions, until the costs of a former action be paid. (*Nisi. D. ante*, 750).
  27. — to stay proceedings in actions under 40s. (*Nisi. D. ante*, 752).
  28. — to stay proceedings in actions pending error. (*Nisi. D. ante*, 753; *Vol. 1*, 338).
  29. — to stay proceedings in other cases. (*Nisi. D.*; *see ante*, 754).
  30. — to stay proceedings until security be given for costs. (*Nisi. D. ante*, 764, 543).
  31. — to stay proceedings in actions upon bail bonds, &c. upon terms. (*Nisi. D. Vol. 1*, 146).
  32. — to set aside a regular *nonpros*, upon terms. (*Nisi. P. ante*, 791).
  33. — to set aside a regular judgment by default, upon terms. (*Nisi. D. ante*, 506).
  34. — to set aside proceedings for irregularity. (*Nisi. D. P. ante*, 782; *Vol. 1*, 142, 110, 451).
  35. — to set aside verdict or nonsuit, and to have a new trial. (*Nisi. P. D. ante*, 824).
  36. — to set aside the execution of a writ of inquiry. (*Nisi. P. D. ante*, 519, 824).
  37. — for judgment *non obstante veredicto*. (*Nisi. P. ante*, 830).
  38. — for leave to amend after judgment. (*Nisi. P. D. ante*, 831).
  39. — to arrest the judgment. (*Nisi. P. D. ante*, 852).
  40. — for leave to discontinue, after verdict. (*Nisi. P. D. ante*, 794).
  41. — for leave to enter up judgment *nunc pro tunc*. (*Nisi. P. D. ante*, 603).
  42. — for leave to enter a suggestion on the roll, to entitle defendant to costs on account of plaintiff's not having recovered amount for which defendant was holden to bail. (*Nisi. D. ante*, 873).
  43. — for plaintiff's costs of suit, in an action on a judgment. (*Nisi. P. ante*, 855).
  44. — for leave to take out execution in ejectment, after the landlord has failed in his defence. (*Nisi. P. ante*, 542).
  45. — for leave to take out execution pending error. (*Nisi. P. D. Vol. 1*, 338; *see ante*, 552).

46. — for leave to enter up judgment on a warrant of attorney of 10 years and not more than 15 years old. (*Nisi. P. ante*, 500).
47. — to examine witness on interrogatories. (*Vol. 1*, 251).
48. — for a mandamus for examination of witnesses. (*Vol. 1*, 252).
49. — that the master may review his taxation. (*Nisi. P. D.*).
50. — to set aside an annuity. (*Nisi*).
51. — that securities be delivered up to be cancelled. (*Nisi. See ante*, 496).
52. — to revoke an arbitrator's authority. (*Nisi. P. D. post*, 909, 910).
53. — to compel attendance of witness, or production of documents before an arbitrator. (*Abs. P. D. post*, 913).
54. — to enlarge the time for making an award where one of the parties withholds his consent. (*Nisi. P. D. post*, 915).
55. — to set aside an award. (*Nisi. P. D. post*, 924). This motion cannot be made on the last day of term.
56. — to set aside a Judge's order. (*Nisi. P. D. post*, 898).
57. — that an attorney may pay costs, &c. for negligence, &c. (*Nisi. Vol. 1*, 40, 43).
58. — to make a rule absolute, where cause is shewn. (*P. D.*)

## SECT. 2.

### *Rules granted without Motion by Counsel.*

*Rule obtained upon a Judge's fiat.*]\* THE following rules are obtained in this manner :—

1. That an infant be admitted to sue by *prochein amy* or guardian. (*Ante*, 674).
2. That an infant be admitted to defend by guardian. (*Ante*, 676).
3. That plaintiff may sue *in formâ pauperis*. (*Ante*, 697).
4. For a rule to discharge a prisoner, upon bail being justified in vacation. (*Vol. 1*, 179).
5. For a rule for a *distringas* in nonbailable actions, in vacation. (*Vol. 1*, 462).
6. For a rule to change the venue, in vacation. (*Ante*, 726).
7. For a rule to plead several matters, not enumerated in the rule, *T. T. 1 W. 4*. (*Ante*, *Vol. 1*, 209).
8. For a rule to compute, in vacation. (*Ante*, 521).
9. For leave to sign judgment on a *scire facias*, where defendant not summoned. (*Ante*, 614).
10. For a rule that a writ of inquiry be executed before a Judge at *Nisi Prius*. (*Ante*, 514).
11. For a rule making a submission to arbitration a rule of Court. (*Post*, 926).



When you have obtained the Judge's *fiat*, take it to the office of the clerk of the rules, and he will thereupon draw up the rule. (*See post*, 897, 898). In the instances 6, 8, and 10, *supra*, you must also take a motion paper, signed by counsel, to the clerk of the rules, together with the *fiat*.

*Rule obtained from the clerk of the rules, upon the master's allowance.*] It seems that the only rule obtained in this manner is the rule for allowance of a writ of error *coram nobis*. (*See Vol. 1, 368*).

*Rules obtained from the clerk of the rules, upon a præcipe.*] The following are, it seems, the only rules obtained in this manner:—

1. Rule to plead generally. (*Vol. 1, 196*).
2. — to plead in *scire facias*. (*Ante, 615*).
3. — to avow in replevin. (*Ante, 586*).
4. — for a view. (*Vol. 1, 264*).
5. — to appear to a *scire facias*. (*Ante, 613*).
6. — for judgment on demurrer. (*Ante, 490*).
7. — for judgment on *nul tiel* record. (*Ante, 483*).
8. — for judgment on *scire facias*. (*Ante, 613*).
9. — for judgment on *scire facias quare executionem non* in error. (*Vol. 1, 364*).
10. — for judgment in error. (*Vol. 1, 367, 370*).
11. — to bring up insolvent debtor under the Lords' act. (*Ante, 655*).

In these cases you make out a *præcipe* or memorandum of the rule you want; take it to the clerk of the rules, and he will draw up the rule.

*Side-bar rules.*] These rules were formerly moved for by the attornies, at the side-bar in Court; but they may now be had of the clerk of the rules, upon a *præcipe* or memorandum, in the manner above mentioned. These rules may be obtained on the last, as well as on other days in term. (*R. H. 2 W. 4, r. 96*). If obtained irregularly, the Court, upon application, will grant a rule to shew cause why they should not be discharged; which rule may afterwards be made absolute in the ordinary way, if no sufficient cause be shewn.

The following is a list of most of the side-bar rules:—

1. Rule that the sheriff return the writ. (*Vol. 1, 133*).
2. — that the sheriff bring in the body. (*Vol. 1, 135*).
3. — for time to declare, or for further time. (*Vol. 1, 187*).
4. — for special imparlance. (*Ante, 588*).
5. — for leave to pay money into Court in all cases. (*Ante, 181, 739*).
6. — for leave to discontinue before verdict, &c. (*Ante, 794*).
7. — to be present at the taxing of costs. (*Vol. 1, 319*).

8. Rule for a *scire facias* to revive a judgment more than seven years old, and not ten. (*Ante*, 612).
9. — for the marshal to acknowledge the defendant in his custody. (*Ante*, 643).
10. Consent rule in ejectment. (*Ante*, 539).

*Rule to plead several pleas obtained from the clerk of the rules upon the engrossment of the pleas, or a draft or copy thereof.]* The following is a list of the pleas which may be pleaded together, or any two or more of them under this rule:—*non assumpsit*, or *nil debet*, or *non detinet*, with or without a plea of tender as to part, a plea of statute of limitations, set-off, bankruptcy of defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy and coverture. (*R. T. 1 W. 4, Vol. 1, 521*).

*Rules obtained from the master.]* The following are the rules obtained directly from the master:—

1. Rule to declare in replevin. (*Ante*, 583).
2. — to reply. (*Vol. 1, 211*).
3. — to rejoin, surrejoin, &c. (*Vol. 1, 213*).
4. — to enter the issue. (*Vol. 1, 221*).
5. — the like, on demurrer. (*Ante*, 478).
6. — to join in demurrer. (*Ante*, 475).
7. — that the defendant produce the record on *nul tiel record*. (*Ante*, 483).
8. — to assign errors. (*Vol. 1, 364, 369*).
9. — to return the *certiorari* in error to this court. (*Vol. 1, 365, 369*).
10. — to join in error. (*Vol. 1, 369*).

*Rule obtained from the clerk of the papers.]* The only rule given by the clerk of the papers is, the rule to return the paper-book or demurrer-book; and which he gives in the margin of the paper-book or demurrer-book itself. (*See Vol. 1, 218; ante, 477*).

*Rules obtained from the clerk of the errors.]* The following rules may be obtained from the clerk of the errors, as of course, upon application:—

1. Rule for better bail. (*Vol. 1, 345*).
2. — to transcribe. (*Vol. 1, 346*).
3. — to allege diminution. (*Vol. 1, 347*).
4. — to assign errors. (*Vol. 1, 347*).
5. — to return the *certiorari* in error to the Exchequer Chamber. (*Vol. 1, 350*).

*Rules obtained from the filacer.]* The only rule obtained from the filacer is the rule to appear in replevin. (*Ante*, 582).

## CHAPTER XXXIV.

## SUMMONSES AND ORDERS.

*Summons.*] WHEN, in the progress of a suit, it becomes necessary to obtain the order of the Court relative to any of the proceedings, we have seen in the last chapter that the parties may apply for it in term time by motion to the Court. But in vacation in some instances, or in term time in all matters of minor importance, the same effect may be had by obtaining the order of a Judge at Chambers. By the 1 W. 4, c. 70, s. 4, in general the Judge may be a Judge of either of the superior Courts, and need not be a Judge of the Court in which the action is pending. And the Judges may now, by stat. 1 G. 4, c. 55, ss. 5, 6, grant summonses and make orders, upon circuit, in cases depending in any of the Courts at Westminster, in which the issues, if brought to trial, would be tried upon their circuits respectively, in the same manner as if they were Judges of the Court in which such causes shall be so depending. In a late case, where a cause, in which there was no notice of set-off, having been referred by order of *nisi prius*, the Judge, during the assizes, made a second order to enable the defendant to give a notice of set-off; the Court held that this statute did not authorize this second order (a).

To obtain a Judge's order, you must in general first summon the attorney or agent of the opposite party before a Judge; *for which purpose make a memorandum of the order required, and take it to the Judge's clerk at the chambers in Scrjeants' Inn, who will thereupon make out the summons* (b). *Make a copy of this summons, and let the person, who is to serve it, examine it with the original, that he may be able to swear to the service, if it afterwards become necessary to do so; then serve the copy on the attorney or agent of the opposite party.* If the opposite attorney or agent be an attorney of this Court, the summons may be served, by leaving a copy at the place mentioned in the book at the master's office (see Vol. 1, 28), with any person resident at, or belonging to such place; and if such attorney have not entered his name and place of abode, &c. in the said book, then fixing up the copy in the King's Bench office shall be deemed a sufficient service. (R. II. 8 G. 3). It must be served before nine o'clock at night, otherwise the service will be void. (R. H. 2 W. 4, r. 50).

A summons is a stay of proceedings only from the time at which

(a) *Ashworth v. Heathcote*, 6 Bingh. 596, 4 M. & P. 396, S. C.

(b) See as to the form, Chit. Forms, 741.

it is attendable, and not from the time of the service (c). It operates, however, as a stay of proceedings from the time it is attendable until it is disposed of, provided the party who obtained it use due diligence in following it up; that is to say, by obtaining and serving a second summons on the same day the first was attendable, in case the opposite party failed to attend it, and then an order.

The following are the most usual cases in which a summons is taken out, for the purpose of obtaining a Judge's order:—

1. Summons for an attorney to deliver up writings, &c. (*Vol. 1, 31*).
2. ——— for changing the attorney in the cause. (*Vol. 1, 36*).
3. ——— to oblige an attorney to deliver his bill. (*Vol. 1, 48*).
4. ——— that an attorney's bill be referred to be taxed. (*Vol. 1, 50*).
5. ——— to discharge a seaman or soldier arrested. (*Vol. 1, 74*).
6. ——— to discharge a certificated bankrupt. (*Vol. 1, 70, 116: ante, 689*).
7. ——— to discharge defendant, on entering a common appearance. (*Vol. 1, 98*).
8. ——— that the sheriff return the writ. (*Vol. 1, 133*).
9. ——— that the sheriff bring in the body. (*Vol. 1, 135*).
10. ——— to cancel a bail bond. (*Vol. 1, 93*).
11. ——— for time to put in bail. (*Vol. 1, 152*).
12. ——— for leave to add bail. (*Vol. 1, 161*).
13. ——— for time to justify. (*Vol. 1, 171*).
14. ——— for leave to inquire after the bail. (*Vol. 1, 173*).
15. ——— to stay proceedings upon bail bond. (*Vol. 1, 146*).
16. ——— for time to declare. (*Vol. 1, 187*).
17. ——— for further time to plead. (*Vol. 1, 199*).
18. ——— to plead several matters not enumerated in the rule of T. T. 1831. (*Vol. 1, 209*).
19. ——— to wave pleas, &c. (*Vol. 1, 211*).
20. ——— for leave to try the action before the sheriff where the debt does not exceed 20*l.* (*Vol. 1, 286*).
21. ——— for leave to try the cause in another county. (*Vol. 1, 217, ante, 869*).
22. ——— to put off trial. (*Ante, 798*).
23. ——— to produce books, papers, &c. at the trial. (*Vol. 1, 238; ante, 771*).
24. ——— for leave to enter suggestions on issue, where by mistake issue has been delivered without them. (*Ante, 526*).
25. ——— to refer it to the master to compute principal and interest on a bill of exchange, in vacation. (*Ante, 520*).
26. ——— for leave to charge a prisoner in custody on a criminal account, with a civil action. (*Ante, 638, 639*).

(c) *Morris v. Hunt*, 2 B. & Ald. 355; *Anthill v. Metcalf*, 2 New Rep. 169;  
*Rex v. Sheriff of Middlesex*, 5 B. & Ald. *Redford v. Edie*, 6 Taunt. 240; *ante*,  
 746; *Glover v. Watmore*, 5 B. & C. 769; Vol. 1, 199.

27. Summons to discharge a prisoner upon supersedeas. (*Ante*, 652).
28. ——— to reverse an outlawry in nonbailable actions. (*Ante*, 711).
29. ——— to consolidate actions upon policies of insurance. (*Ante*, 735).
30. ——— to stay proceedings upon payment of debt and costs. (*Ante*, 745).
31. ——— for relief by persons not sheriffs against adverse claims. (*Ante*, 756).
32. ——— for copies of written instruments. (*Ante*, 769).
33. ——— for opposite party to admit a document stated in the pleadings. (*Vol.* 1, 238).
34. ——— for particulars of demand, set-off, &c. (*Ante*, 774).
35. ——— for the sheriff to return a good jury upon a writ of inquiry. (*Ante*, 514).
36. ——— for leave to amend. (*Ante*, 831).
37. ——— in vacation for leave to issue a *scire facias* to revive a judgment of more than 10, and not more than 15 years old. (*Ante*, 500).
38. ——— to revoke an arbitrator's authority. (*Post*, 909, 910).
39. ——— to enlarge the time for arbitrator making award. (*Post*, 915).
40. ——— to examine witness on interrogatories, &c. (*Vol.* 1, 251, 252).

*Proceedings thereon.*] When the opposite attorney is served with a copy of the summons, if he have no cause to shew, he may indorse upon the summons his consent to an order being made; it is optional with him, however, whether he do so or not.

If he indorse his consent, *you may immediately take the summons so indorsed to the Judge's chambers, and the clerk will make out the order as a matter of course (d). Then serve the order on the opposite attorney or agent.* Unless the order be actually drawn up and served, the other party may proceed as if no summons had been taken out, although he have indorsed his consent, as above mentioned (e).

If the opposite attorney or agent do not consent to an order, *attend at the Judge's Chambers at the hour appointed by the summons, and wait there half an hour; (R. T. 35 G. 3); and if the opposite attorney or agent, or some person for him, do not attend within that time, then take out a second summons, and serve him with a copy of it, as at first; and if he do not attend within the half hour after the time appointed by such second summons, (R. T. 2 W. 4), then, upon affidavit of the two summonses and attendances (f), the Judge's clerk will make out the order required, and give it to you. Then serve the order on the*

(d) See the form, Chit. Forms, 741.

(e) *Joddrell v. —*, 4 Taunt. 253; *Edensor v. Huffman*, 2 C. & J. 140; MS. E. 1820; F. T. 1832; *Charges v. Farhall*,

4 B. & C. 865, 7 D. & R. 422, S. C.; *Sedgwick v. Allerton*, 7 East, 542. *Vide infra*.

(f) See a form, Chit. Forms, 741.

*opposite attorney or agent.* In some cases, however, the summons is granted peremptorily in the first instance, and a second summons is not required; as for an order to deliver or tax an attorney's bill, (*R. H. 2 W. 4, r. 91*), or for a *supersedeas* to discharge the defendant out of custody for not declaring against him in due time, &c. (*R. H. 2 W. 4, r. 89*; see *ante*, 652).

But if the opposite attorney or agent attend upon any of these summonses, you will be called in before the Judge in your turn, and upon your stating the grounds of the application, and the opposite attorney shewing cause against it, the Judge either grants or refuses the order, as he thinks fit. If he grant the order, it must be drawn up and served, otherwise the opposite party will not be bound to notice it (*g*). In ordinary cases, the attorneys attend before the Judge and support the application, or shew cause against it; But in cases of difficulty they usually attend with counsel, in which case they have precedence.

As to the hours at which the Judges attend at Chambers, see *Vol. 1, 62*.

*Costs.*] A Judge at Chambers has, it seems, power to give costs on a summons (*i*).

*Order.*] If an order be made, it must be drawn up and served forthwith, or the opposite party may treat it as abandoned, and proceed (*j*).

The order, made as above mentioned, is in effect as binding and imperative as a rule of Court; and it may in like manner be enforced by attachment, by previously moving to make it a rule of Court (*k*).

If the party, however, against whom an order has been made, be dissatisfied with it, if made in term he may immediately apply to the Court to have it set aside; or if made in vacation, he may apply to the Court in the following term to have, not only the order, but also all other proceedings which have been had under it, set aside; by which means he obtains the opinion of the Court upon the propriety or validity of the order, and it is set aside or confirmed accordingly (*l*).

*Orders granted without summons.*] Besides the orders granted upon summons, in the instances before mentioned, there are some cases where a Judge at chambers will make an order without summons; such as,

1. Order that defendant may be holden to bail, in trover, &c. (*Vol. 1, 82*).

(*g*) *Sedgwick v. Allerton*, 7 East, 542; M.S. E. 1820, E. T. 1832, *supra*. See *Wright v. Stevenson*, 5 Taunt. 850.

(*i*) *Doe d. Prescott v. Roe*, 1 Dowl. P. C. 274, 2 M. & Scott, 119, 9 Bingh. 104, S. C.; *Hughes v. Brand*, 2 Dowl. P. C. 131; see *vide Spicer v. Todd*, 2 C. & J. 165, 1 Dowl. P. C. 306, S. C.; *Keat v.*

*Lee*, 2 B. & Adol. 415, 1 Dowl. P. C. 52, S. C.

(*j*) *Charges v. Farhall*, 4 B. & C. 865, 7 D. & R. 422, S. C.

(*k*) See *Hart v. Draper*, 7 Taunt. 43; *Baker v. Rye*, 1 Dowl. P. C. 689.

(*l*) See *James v. Kirk*, 1 Chit. Rep. 246; *Rex v. Wilkes*, 4 Bur. 2569.

2. Order that plaintiff may issue a *distringas* to compel appearance of, or to outlaw defendant. (*Vol. 1, 462*).
3. — that plaintiff may sue *in forma pauperis*. (*Ante, 697*).
4. — that unless an infant defendant appear, John Doe may be assigned as his guardian, and a common appearance be entered for him. (*Ante, 676*).
5. — to compel attendance of witness or production of documents, before an arbitrator. (*Post, 913*).

There are also other cases in which the Judge's order or *fiat* merely requires the clerk of the rules to draw up a rule of Court, where such rule becomes necessary in vacation. (*See ante, 891, 892*) (*m*).

<sup>\*</sup> (*m*) See the form of fiat, Chit. Forms, 740.

## CHAPTER XXXV.

## AFFIDAVITS.

THE contents of an affidavit must necessarily vary according to the circumstances of each case. If there be any rules relating to it in particular cases, they will be found under their respective heads in some preceding part of this work. But the only general rule which can be laid down is, that the affidavit set forth all the facts and circumstances necessary to be stated in each particular case, explicitly and with certainty; and that where a deponent swears to any fact as within his own knowledge, he must swear directly and positively. When the affidavit is made by one person only, it begins thus: "*A. B. of ———, gentleman, maketh oath and saith, that,*" &c.; but when made by more than one person, then thus: "*A. B. of ———, gentleman, and C. D. of ———, esquire, severally make oath and say; and first this deponent, A. B. for himself saith, that,*" &c. "*And this deponent, C. D. for himself saith, that,*" &c.; and if there be any facts to which both of them can swear, then "*And these several deponents A. B. and C. D. say, that,*" &c. (a). Clerical errors and mistakes in spelling are not considered a sufficient ground for rejecting an affidavit when the meaning is clear (b).

*Title.*] If there be a cause in Court, all affidavits made use of in the progress of it must be intitled correctly *in the Court* (c); unless made before a Judge of the Court in which the affidavit is to be used, in which case it need not be so intitled. (*R. H. 2 W. 4, r. 4*). It has been held that an affidavit not intitled in the Court, but purporting at the foot of it to have been sworn before "*J. Y. deputy filacer*" (d), or "*at the King's Bench office, Inner Temple, before me, T. C.*" (e), was sufficient.

The affidavit must also be intitled *in the cause*, stating the christian names as well as the surnames of all the parties (f). If defective in either of these respects, the Court will not allow them to be read, even although the adverse party be willing to waive the objection (g). And if the affidavit be in verification of a plea in abatement, the plaintiff might, for such a defect, sign judgment for want of a plea (h). The affidavit should also shew in its title of the names of the parties in the cause the character in which they sue or

(a) See Chit. Forms, 742.

(b) *Bromley v. Foster*, 1 Chit. Rep. 562.

(c) *Molling v. Bland*, 3 M. & Sel. 157; *Rex v. Hare*, 13 East, 189; *Osborn v. Tatum*, 1 B. & P. 271; *Rolfe v. Burke*, 12 Moore, 298, 4 Bingh. 101, S. C.

(d) *Bland v. Drake*, 1 Chit. Rep. 165.

(e) *Howell v. Wilkin*, 7 B. & C. 703.

(f) *Fores v. Diemar*, 7 T. R. 661. See *Dand v. Barnes*, 6 Taunt. 5; *Mackenzie v. Martin*, Id. 286; *Prince v. Nicholsen*, 5 Id. 333; *Doe d. Spencer v. Want*, 8 Id. 647; *Thorp v. Hook*, 1 Dowl. P. C. 494.

(g) *Owen v. Hura*, 2 T. R. 644.

(h) *Poole v. Pembrey*, 1 Dowl. P. C. 693.



are sued (i). Even styling the plaintiff as "assignee," without saying of whom, has been held defective (j). But the intituling of an affidavit by describing the plaintiff as "gent. one &c.," the plaintiff not being an attorney, does not vitiate it, and the description may be rejected as surplusage (k). If an action be against several defendants, if they be not all in Court, the affidavit may be intituled in the names of those only who are in Court (l). Where a cause is removed into the Exchequer by writ of error, all affidavits in the Exchequer must be intituled in the cause in error, and not in the original action (m). And so on a writ of false judgment (n). It seems that the affidavits in support of a rule for a *procedendo* should not be intituled in the cause in the inferior court, but "in the King's Bench" (o). On moving for a rule *nisi* for a *certiorari* the affidavits must not be intituled in any cause (p). An affidavit to support a rule *nisi* for staying proceedings on a bail bond may be intituled in the action against the bail (q), or in the original action (r); if, however, proceedings against bail be founded upon a judgment irregularly obtained by the plaintiff, only one application is necessary to set aside the irregular judgment and the proceedings against the bail, and the affidavits in such a case must be intituled in the original action (s). So, if a judgment be obtained irregularly, and an action be brought on such judgment, the proceedings in the second action and the judgment in the first may be set aside by one rule, and the affidavits be intituled in the original action (t). Upon an application for a rule that an attorney pay over a sum of money received by him in a particular cause, the affidavits must be intituled in the cause in which the money was received (u). But where there is as yet no cause in court, the affidavits should not be intituled; otherwise the Court probably would not allow them to be made use of. Thus, an affidavit to hold to bail must not be intituled, or, if intituled, it cannot be read (v), because, as yet, there is no cause in Court. In moving for leave to enter up judgment on an old warrant of attorney the affidavit may be intituled in a cause (w), but this is not absolutely requisite (x). Where a submission to arbitration is made a rule of Court, and no action is pending, the affidavits in support of an application to set aside the award, or for an attachment for not performing it, need not be intituled (y), although the affidavits in shewing cause must (z).

(i) *Steyner v. Cottrell*, 3 Taunt. 377; *Fores v. Diemar*, 7 T. R. 661; *Bullman v. Callow*, 1 Chit. Rep. 727; *Wright v. Hunt*, 1 Dowl. P. C. 457; *Anon. Executors v. Administrators*, Id. 97.

(j) Id.

(k) *Reeves v. Crisp*, 6 M. & Sel. 274.

(l) *Dand v. Barnes*, 6 Taunt. 5, 1 Marsh. 403, S. C.; 6 Taunt. 826. But see *Bullman v. Callow*, 1 Chit. Rep. 727, 728, (a).

(m) *Gandell v. Rogier*, 4 B. & C. 862, 7 D. & R. 259, S. C.

(n) *Watson v. Walker*, 8 Bingh. 315, 1 M. & Scott, 437, S. C.

(o) *Jameson v. Schondwar*, 1 Dowl. P. C. 175.

(p) *Ex p. Nohro*, 1 B. & C. 267.

(q) *Roberts v. Giddins*, 1 B. & P. 337; *Kelly v. Wrother*, 2 Chit. Rep. 109.

(r) *Lines v. Chetwode*, Exch. MS., 16th Jan. 1832; *sed vide* 1 Bingh. 142, 7 Moore, 521, S. C., *contra*.

(s) *Barlow v. Kaye*, 4 T. R. 688.

(t) Id.

(u) MS. E. 1814.

(v) R. T. 37 G. 3.

(w) *Sowerby v. Woodroff*, 1 B. & Ald. 567; *Poole v. Robberds*, Id. 568, (a).

(x) *Ex p. Gregory*, 8 B. & C. 409.

(y) *Bainbrigge v. Houlton*, 5 East, 21.

(z) *Bevan v. Bevan*, 3 T. R. 601; *In re Houghton*, 2 M. & P. 452.

But where a cause is referred under an order of *Nisi Prius*, the affidavits must be intitled in the cause. The proceedings upon an attachment in a civil suit being upon the civil side of the Court until the attachment is actually awarded, the affidavits in applying for the rule *nisi* (b), and in shewing cause against it (c), must be intitled in the action; but after the rule is made absolute, all future affidavits (as upon an application to set aside the attachment, or the like) must be intitled, "*The King v. The party attached*" (d); and in the case of an attachment against the sheriff, you must also add the name of the cause, thus: "*The King against the Sheriff of Middlesex, in a cause of J. N. against J. S.*" though this is not absolutely requisite (e).

*Deponent's addition.*] The affidavit must state the true place of abode, and the true addition, of the person making it (f) (*R. M.* 15 C. 2; *R. H.* 2 W. 4, r. 5); otherwise the Court will not allow it to be used, or, in the case of an affidavit to hold to bail, will discharge the defendant on a common appearance (g). The deponent's addition must be stated, though he be a party in the cause (h). Where a deponent described himself as of "the city of London, merchant," it was holden to be sufficient (i). And where a foreigner who had come to this country merely for temporary purposes, described himself as of his place of residence abroad, it was deemed sufficient (k). So, where an attorney's clerk stated the place of business of his employer as his residence (l). So, where a clerk described himself of the office where he did business during the day, although he slept elsewhere at night (m); and where a person lately discharged from prison, but who slept there at night, described himself as late of that prison (n); the Court held these to be sufficient descriptions of the deponent's place of abode, within the meaning of the rule of court above mentioned. But a deponent cannot describe himself as late of a place where he has ceased to reside, when he actually resides at another place at the time of making the affidavit (o). And where the defendant described himself as of Dorset Place, Clapham Road, Middlesex, and his true place of residence was Dorset Place, Clapham Road, Surrey, it was holden bad (p). But the Court have refused to try the real place of the deponent's abode upon affidavit (q).

As to the addition: the true addition of the deponent's degree or

- (b) *Wood v. Webb*, 3 T. R. 253.
- (c) *Whitehead v. Firth*, 12 East, 165.
- (d) *Rex v. Sheriff of Middlesex*, 7 T. R. 439, 527; *Whitehead v. Firth*, 12 East, 165.
- (e) *Rex v. Sheriff of Middlesex*, 5 B. & C. 389, 8 D. & R. 149, S. C.
- (f) *Jarrett v. Dillon*, 1 East, 18.
- (g) *Lawson v. Case*, MS. Exch. E. T. 1833, 1 C. & M. 481, 2 Dowl. P. C. 40, S. C.; *sed vide Poole v. Pembrey*, 1 Dowl. P. C. 693.
- (i) *Vaister v. Alderson*, 3 M. & Sel. VOL. II.

- 165.
- (k) *Douchet v. Kittoe*, 3 East, 154.
- (l) *Alexander v. Milton*, 1 Dowl. P. C. 570, 2 C. & J. 424, S. C.
- (m) *Haslop v. Thorne*, 1 M. & Sel. 103; *Anon.* 2 Chit. Rep. 15.
- (n) *Sedley v. White*, 11 East, 528.
- (o) *Sedley v. White*, 11 East, 529.
- (p) *Collins v. Goodger*, 4 D. & R. 44, 2 B. & C. 563, S. C.
- (q) *Tidd*, 9th ed. 179, 2 Smith, 207, S. C.

mystery must be inserted; merchant (*r*), and manufacturer (*s*), have been considered sufficient. (*See Vol. 1, 83*) (*t*). An affidavit of merits, to set aside an interlocutory judgment, or the like, must be made either by the party himself, or by his attorney in the cause, or by the managing clerk of the attorney, who has the management of that particular cause; and he must describe himself accordingly in the affidavit (*u*).

It is not in general necessary to give any addition to any other party but the deponent (*x*). But the christian and surnames of parties ought in general to be inserted if practicable (*y*).

*Jurat.*] The jurat is written at the foot of the affidavit, to the left of the page, in this form: "Sworn at ———, this ——— day of ———, 1834, before me —." But if the affidavit be made by two or more persons, their names must be severally written in the jurat; (*R. M. 37 G. 3, r. 1; R. T. 1 G. 4, Exch.*) (*z*); and the form in that case will be thus: "The above-named deponents, *A. B. and C. D.*, were severally sworn at ———, this ——— day of ———, 1834, before me —." The time of swearing the affidavit must be stated in the jurat (*a*). If the affidavit be sworn before a commissioner of the Court, by a person who from his signature appears to be illiterate, such commissioner shall certify in the jurat that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same, and that the party wrote his signature in the presence of the commissioner; (*R. E. 31 G. 3*) (*b*); but if sworn before a Judge, or in Court, this is unnecessary. When an affidavit is made by a foreigner in the English language, an interpreter must be sworn by the officer taking the affidavit to interpret it truly, and the jurat should state that the interpreter was so sworn, and did interpret the affidavit. It is not, however, necessary that any affidavit should be made by the interpreter, or the officer taking the affidavit; it is sufficient that the latter certifies by the jurat that such steps were taken (*c*). In the case also of an affidavit made by a marksman, it is sufficient for the officer making the jurat, to certify thereon, that it was read over to the deponent and seemed to be understood by him, without the officer's making an affidavit. If the affidavit be in a foreign language, there must be another affidavit by an interpreter as to its translation and meaning. Also, if sworn before a commissioner, it is necessary that the jurat

(*r*) *Vaissier v. Alderson*, 3 M. & Sel. 165.

(*s*) *Smith v. Younger*, 3 B. & P. 550.

(*t*) See *Anon.* 6 Taunt. 73; and see the cases as to the description of ball in the notice of, *ante*, Vol. 1, 154.

(*u*) *Neesom v. Whytock*, 3 Taunt. 403.

(*v*) See *Waters v. Joyce*, 1 D. & R. 150.

(*y*) See *Reynolds v. Hankin*, 4 B. &

Ald. 536. But see *Howell v. Coleman*, 2 B. & P. 466.

(*z*) 6 Bingh. 236; 7 T. R. 82.

(*a*) *Doe v. Roe*, 1 Chit. Rep. 228; *Wood v. Stephens*, 3 Moore, 236.

(*b*) 4 T. R. 284. See 1 Chit. Rep. 660.

(*c*) *Rosc v. Solliers*, 6 D. & R. 514, 4 B. & C. 358, S. C.; and see *Marzetti v. Joffroy*, 1 Dowl. P. C. 41.

state the place where the affidavit was sworn (*d*); and it should appear that the person before whom it is sworn is a commissioner of this Court (*e*); although, perhaps, this would not be considered material, if the affidavit be intitled "*In the King's Bench*," and the commissioner be in fact a commissioner of the Court (*f*). But in a late case in the Common Pleas, it was held that an affidavit of debt sworn before a commissioner in the country, without stating him to be a commissioner in the jurat, is insufficient, although intitled in the Court (*g*). If sworn in Ireland, or Scotland, or abroad, see *post*, 904. If there be any interlineation or erasure in the jurat, the affidavit cannot be read or made any use of. (*R. M. 37 G. 3*) (*h*). But an erasure over the jurat does not vitiate it (*i*). A defect in the jurat will render the affidavit unavailable, and in general time to cure it will not be given (*k*).

*How long in force.*] An affidavit if not acted on within a year after it is sworn cannot be acted on afterwards. (*See ante*, Vol. 1, 93) (*l*).

*Defects, when aided.*] Defects in affidavits are very rarely aided; and, if defective, time is seldom granted to cure the defect, except in some cases of bail. In the case of affidavits to hold to bail, defects are waived in general by the appearance of the defendant, &c. (Vol. 1, 94); but they cannot in any case be remedied by a supplementary affidavit, (*Id.*), excepting in the case of an affidavit of service of declaration in ejectment. (*Ante*, 535). As to the allowing of additional affidavits to be used after obtaining a rule *nisi*, see *ante*, 882, 884, &c. Where a motion for a rule *nisi* is made, upon certain affidavits, the party will not be allowed, afterwards when cause is shewn, to make use of any other affidavits made subsequently, at least without the leave of the Court, unless such additional affidavits be merely confirmatory of what was already sworn when the rule *nisi* was made (*m*); nor will he be allowed to make use of any other affidavits, made previously in the same cause, and already on the files of the Court, unless they be expressly specified in the rule *nisi* (*n*). As to the amending an affidavit in the Exchequer, see 1 *Tyng. Rep.* 261.

*Before whom to be sworn.*] Affidavits, intended to be used in the course of any proceedings in this Court, must be sworn either in Court, or before one of the Judges sitting at *Nisi Prius* (*o*), or at chambers; or before a commissioner of the Court authorized to take

(*d*) MS. E. 1814; *Rex v. Justices West Riding Yorkshire*, 3 M. & Sel. 493. See *French v. Bellew*, 1 M. & Sel. 302; *sed vide Symmers v. Wason*, 1 B. & P. 105; and see Vol. 1, 91.

(*e*) *Rex v. Hare*, 13 East, 189.

(*f*) See *Kennet Canal Company v. Jones*, 7 T. R. 451.

(*g*) *Howard v. Brown*, 1 M. & P. 22, 4 Bingham, 393, S. C.

(*h*) See forms of the jurat in these se-

veral instances, Chit. Forms, 17. See *Houlden v. Fasson*, 6 Bingham, 236, 4 M. & P. 127, S. C.

(*i*) *Atkinson v. Thomson*, 2 Chit. Rep. 19.

(*k*) See *Anon.* 2 Chit. Rep. 20.

(*l*) *Burt v. Owen*, 1 Dowling, P. C. 691.

(*m*) *Solloway v. Whorewood*, 2 Salk. 461.

(*n*) *Per Bayley, J.*, MS. E. 1824.

(*o*) *Rex v. Jolliffe*, 4 T. R. 285.

affidavits by *stat.* 29 C. 2, c. 5 (*p*); or before a commissioner empowered to take affidavits in Scotland or Ireland by the *stat.* 3 & 4 W. 4, c. 42, s. 42, *infra*; or, in case of an affidavit to hold to bail, before the officer who issues the process, or his deputy. (12 G. 1, c. 29; *Vol.* 1, 92). When made before a commissioner in the country, if he be also the attorney on record of the party for whom it is made, or if he be the clerk of such attorney, it cannot be read, (*R. H.* 2 W. 4, r. 6) (*g*), unless it be an affidavit to hold to bail; (*R. E.* 15 G. 2, r. 2; *R. H.* 2 W. 4, c. 6); and no affidavit of the service of process will suffice, if made before the plaintiff's own attorney or his clerk. (*R. H.* 2 W. 4, r. 3). It has been held, that, since the 11 G. 4 & 1 W. 4, c. 70, s. 4, it is no objection to an affidavit to ground an attachment against a witness for contempt, that it is sworn before a Judge of a different Court from that to which the contempt was shewn (*r*).

By the 3 & 4 W. 4, c. 42, s. 42, a power is given of granting commissions to take affidavits in Scotland and Ireland. And the enactment, after reciting that "it would be convenient if the power of the superior Courts of common law and equity at Westminster to grant commissions for taking affidavits to be used in the said Courts respectively should be extended," is as follows, "That the Lord High Chancellor, Lord Keeper or Lords Commissioners of the Great Seal, the said Courts of Law, and the several Judges of the same, shall have such and the same powers for granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the said Courts respectively, as they now have in all and every the shires and counties within the kingdom of England, and dominion of Wales, and town of Berwick-upon-Tweed, and in the Isle of Man, by virtue of the statutes now in force; and that all and every person and persons wilfully swearing or affirming falsely in any affidavit to be made before any person or persons who shall be so empowered to take affidavits under the authority aforesaid, shall be deemed guilty of perjury, and shall incur and be liable to the same pains and penalties as if such person had wilfully sworn or affirmed falsely in the open Court in which such affidavit shall be intitled, and be liable to be prosecuted for such perjury in any court of competent jurisdiction in that part of the United Kingdom in which such offence shall have been committed, or in that part of the United Kingdom in which such person shall be apprehended on such a charge."

If an affidavit, intended to be used in this Court, be sworn before a Judge in Ireland or Scotland, the Judge's signature to the jurat must be verified by an affidavit made in this country; but if sworn before any other person, (except, perhaps, a commissioner authorized by the above act, 3 & 4 W. 4), or before any Judge or other officer in a foreign country, not only his signature to the jurat, but also his authority to administer oaths and take affidavits, must be verified in like manner (*s*). The Court of Exchequer in this country have, in

(*p*) See *Rea v. Jones*, 2 Salk. 461.

(*g*) *Rex v. Wallace*, 3 T. R. 403; *Hopkinson v. Buckley*, 8 Taunt. 74. See *Horsfall v. Matthewman*, 3 M. & Sel. 514; *Read v. Cooper*, 5 Taunt. 89; *Williams v. Hockin*, 8 Id. 435.

(*r*) *Phillips v. Drake*, 2 Dowl. P.C. 45.

(*s*) See *Kench v. Bellew*, 1 M. & Sel. 302; *O'Mealy v. Newell*, 8 East, 364; *Dalmer v. Barnard*, 7 T. R. 251; *Ex p. Worsley*, 2 H. Bl. 275; *Pickardo v. Machado*, 4 B. & C. 886, 7 D. & R. 478, S.C.

several instances, allowed an affidavit sworn before a commissioner of the Court of Exchequer in Ireland, or a magistrate in Scotland, to be read (t). It has been made a question, but not decided, whether a British consul or vice-consul resident in a foreign country, has authority, by virtue of his office, to administer an oath for the purpose of holding a defendant to bail in this country (u).

Where an application to the Court is to be founded on an affidavit, such affidavit must be sworn and produced in Court, before the rule shall be drawn up. (*R. H. 36 G. 3, r. 1; ante, 882*).

*When to be filed.*] Affidavits to hold to bail are filed at the time you sue out the process. (*See Vol. 1, 82*). As to filing affidavits on motions, *see ante, 882, 884*. In all other cases, if the affidavit be sworn in town, they must be filed with the clerk of the rules, as soon as used, whether the motion be granted or not, in order that they may be given in evidence, if necessary, on an indictment for perjury (x); but if sworn before a commissioner, in strictness they should be first filed with the clerk of the rules, and then copies taken of them for the purpose of being used in Court, (*29 C. 2, c. 5; R. M. 9 G. 2*), which, however, is not attended to in practice.

Also, in all cases where a special time is limited in any rule, before which time an affidavit is required to be filed, no affidavit filed after that time shall be made use of in Court, or before the master, unless it shall appear to the satisfaction of the Court that the filing of such affidavit, within the time limited, was prevented by inevitable accident. (*R. M. 36 G. 3*).

(t) *Kilby v. Stanton*, 2 Y. & J. 75; *Ellis v. Sinclair*, 3 Y. & J. 273; *Watson v. Williamson*, 1 Dowl. P. C. 607.

(u) *Pickardo v. Machado*, 4 B. & C. 886, 7 D. & R. 478, S. C.; *Exp. Lady Hutchinson*, 1 M. & P. 559, 4 Bingh.

606, S. C.

(x) *Res v. Crossley*, 7 T. R. 315; *Johns & Mills*, 24th Nov. 1832, K. B. MS.; 1 Dowl. P. C. 510, S. C.; *Exp. Dicus*, 2 Dowl. P. C. 92.

## PART II.

## ARBITRATION.

SECT. 1. *The Reference*, 906 to 911.

2. *The Award*, &c. 911 to 918.

3. *Setting aside the Award*, 918 to 925.

4. *Enforcing Performance of Award*, 925 to 929.

## SECT. 1.

*The Reference.*

Where there is a cause in Court, and where the matter intended to be submitted to arbitration is also the subject of an action pending in this Court, if the defendant have been holden to bail, it is usual to wait until the cause shall be called on at *Nisi Prius*, and then take a verdict for the damages stated in the declaration, subject to the award of the person to whom the cause is to be referred; otherwise the reference to arbitration would be a discharge of the bail (*Vol. 1, 427*) (a). But if the defendant have not been holden to bail, then the cause may be referred, at any time before trial, by rule of Court; or, when the cause is called on, by order of *Nisi Prius*, with or without a verdict being taken, as the parties shall judge proper. Where an attorney agreed to refer a cause at *Nisi Prius*, without the consent or knowledge of his client, the Court refused to set aside the rule of reference on that account, even although the application for that purpose was made previously to any proceedings being had before the arbitrator (b).

If the cause be referred at *Nisi Prius*, the leading counsel for both parties fix upon the arbitrator, indorse their briefs accordingly, and hand them in to the clerk of *Nisi Prius*, or associate, in order that he may draw up the order of *Nisi Prius* from them (c). But if the cause is to be referred before trial, then let each party get a motion-paper to that effect signed by counsel; take them to the clerk of the rules, and draw up the rule (d). Or, by the attorneys on both sides signing a consent, they may thereupon obtain a Judge's order to the same effect (e). After obtaining the rule or order, you proceed as is

(a) 2 Saund. 72 b.

(b) *Fulmer v. Delber*, 3 Taunt. 486.

See Vol 1, 38.

(c) See form of order, Chit. Forms, 743.

(d) See form of rule, Chit. Forms,

745.

(e) See form of order, Chit. Forms,

747.

directed in the next section. Where a cause was referred at *Nisi Prius*, and a verdict taken subject to the award of a barrister; the barrister afterwards declined proceeding in the reference, on the ground that his opinion had been previously taken by one of the parties relative to the matter in dispute; and the defendant thereupon refused to join in naming another arbitrator, insisting upon the matter being submitted to a jury: the Court upon application ordered, that, unless the defendant would consent to refer the damages to another arbitrator, judgment should be entered up, and execution issue, for the damages given by the verdict (*d*).

It may be necessary to mention in this place, that the arbitrator cannot (as far as relates to the action referred) award the payment of a greater sum than is laid as damages in the declaration; nor will the Court, after a verdict taken as above-mentioned, allow the declaration to be amended, so as to enlarge these damages, even upon affidavit that a greater debt can be proved before the arbitrator (*e*).

*Where there is no cause in Court.*] Matters in difference between parties, which are not the subject of any action pending at the time, may be referred to arbitration in any of the three following ways:— 1st, By mutual bonds or other deed or written agreement of submission, merely: 2dly, By ~~mutual~~ bonds, deed, or agreement, containing also the parties' assent that such submission shall be made a rule of court; (9 & 10 *W. 3*, c. 15, s. 1) (*f*); and, 3dly, By parol agreement; in which case, however, the submission cannot be made a rule of court, even although the parties consent to it (*g*).

The submission should be executed by the parties themselves, and not by their attornies, unless by virtue of a power of attorney. Even one of two or more partners cannot bind the others by a submission to arbitration of matters arising out of the business of the firm (*h*), without a power of attorney authorizing him to do so. And where a person signed a submission as attorney for another, without a power expressly authorizing him to do so, and the arbitrator awarded that the attorney should pay a sum of money, the Court held that the attorney should perform the award, and that his principal was not bound by the submission (*i*). Also, where two persons bound themselves jointly and severally to perform an award, and the arbitrator awarded a sum to be paid by each, the Court held that both were jointly liable for each of the sums so awarded (*k*). Where several underwriters on a policy agreed to refer the demand of the assured, it was holden that, as they had a community of interest in the subject of the insurance, and were all underwriters on the same policy,

(*d*) *Woolley v. Clark*, 2 D. & R. 158, 1 B. & C. 68, S. C. See *Kirkus v. Hodgson*, 8 Taunt. 733.

(*e*) *Pearse v. Cameron*, 1 M. & Sel. 675; *Prentice v. Reed*, 1 Taunt. 151.

(*f*) See form of bond, Chit. Forms, 749.

(*g*) *Ansell v. Evans*, 7 T. R. 1; *God-*

*frey v. Wade*, 6 Moore, 488.

(*h*) *Stead v. Salt*, 10 Moore, 389, 3 Bingh. 101, S. C. See *Barnell v. Minot*, 4 Moore, 340.

(*i*) *Bacon v. Dubarry*, 1 Ld. Raym. 246, 1 Salk. 70, S. C.

(*k*) *Mansell v. Burridge*, 7 T. R. 352. See *Barnes*, 55.



one stamp for the submission and one stamp for the award were sufficient (l).

The submission, in order that it may be made a rule of court under *stat. 9 & 10 W. 3, c. 15, s. 1*, must be of some controversy or suit, "for which there is no other remedy but by personal action or suit in equity." Therefore, the Court have refused to make a submission a rule of court, where part of the matter agreed to be referred (namely, an assault), had been made the subject of an indictment (m). So, where a debt submitted arose out of an illegal transaction, the Court of Common Pleas set aside that part of the award which directed payment of it (n). Also, it has been holden that the right of real property cannot pass by mere award (o); but it is clear that a conveyance or release of land may be awarded (p).

The submission should distinctly specify the matter of controversy submitted; or, if stated generally, it should be "of all matters in difference between the parties." Where an action is pending, it may be "of all matters in dispute in the cause between the parties," or "of all matters in dispute between the parties in the cause" (q); the former confining the submission to the matter of the suit then pending (r), the latter extending it to all matters in difference; and the costs being to abide the event, makes no difference (s). It is now more usual, in case of a general reference, to use the phrase "of all matters in difference between the parties," and "of all matters in difference in the cause," where the action alone is referred. It has been holden that a reference of "all matters in difference between the parties" does not preclude one of the parties from afterwards suing for a cause of action subsisting at the time of the reference, if such matter were not a matter in difference between the parties, nor laid before the arbitrator (t); but in a late case, where the reference was "of all actions and causes of actions between the parties," and, after the award made, the party thereby ordered to pay a sum of money wished to deduct from it a sum due to him by the opposite party, and which had not been under the consideration of the arbitrators, the Court held that he could not do so; for the rule of reference was large enough to include that transaction, and it should have been discussed before the arbitrator (u). A submission to arbitration by an executor or administrator is not of itself an admission of assets (x); but it impliedly includes in it a submission of the question whether the executor have assets; and if the arbitrator award that he shall pay a sum of money, this is virtually an award that he has assets to that amount, and he must pay it (y).

(l) *Goodson v. Forbes*, 6 Taunt. 171.

(m) *Watson v. McCullum*, 8 T. R. 520. See *Rex v. Cotesbatch*, 2 D. & R. 265; but see *Baker v. Townsend*, 7 Taunt. 422.

(n) *Aubert v. Maze*, 2 B. & P. 371.

(o) 1 Ro. Abr. 242; *Marks v. Marriot*, 1 Ld. Raym. 115.

(p) 3 Bl. Com. 16.

(q) *Smith v. Muller*, 3 T. R. 626.

(r) *Malcolm v. Fullarton*, 2 T. R. 644.

(s) *Id.* 645; 2 Saund. 64, (7).

(t) *Rance v. Farmer*, 4 T. R. 146; *Thorpe v. Cooper*, 5 Bingh. 129; *Seddon v. Tutop*, 6 T. R. 607.

(u) *Smith v. Johnson*, 15 East, 213; *Dunn v. Murray*, 9 B. & C. 780; and see *Martin v. Thornton*, 4 Esp. 180; *Shelling v. Farmer*, 1 Str. 646.

(x) *Pearson v. Henry*, 5 T. R. 6.

(y) *Worthington v. Barlow*, 7 T. R. 453; *Barry v. Rush*, 1 Id. 691.

The clause of consent in the submission, that it shall be made a rule of court, may be to this effect: That the parties do thereby "consent and agree that this their submission to the arbitration or umpirage above-mentioned shall be made a rule of his Majesty's Court of King's Bench at Westminster, pursuant to the statute in such case made and provided." Where this clause mentioned only "the Court," without stating which Court, the Court of Common Pleas allowed the submission to be made a rule of that Court (z). And where the consent was, that the "award" instead of the "submission" should be made a rule of court, the Court held the mistake to be immaterial (a). Also, where the clause was conditional, thus: "And if the obligor shall consent that this submission be made a rule of court, that then," &c.; the Court held it to be sufficient (b).

After entering into the submission, and consenting that it should be made a rule of court, either party, before the recent act of 3 & 4 W. 4, c. 42, might *revoke* his submission by deed, at any time *before* the making of the award, and before the submission had actually been made a rule of court; and this, though the cause was referred by order of *Nisi Prius* (c); and if the arbitrator had afterwards proceeded and made his award, notwithstanding the revocation, the party would not have been liable to an attachment for a nonperformance of it, (particularly if the arbitrator had had notice of the revocation before the award was made) (d), and the Court upon application would have set it aside (e); and could not vacate the revocation (f). Where, however, it appeared doubtful whether the arbitrators had made their award previous or subsequent to their receiving notice of a deed of revocation, the Court of Common Pleas would not stay the proceedings, but left the party to plead such matter *puis darrein continuance* (g). The bond of submission, however, became forfeited by such revocation, and the obligee might immediately have sued upon it (h); or the Court might upon the rule, or upon the Judge's order being made a rule of court (i), have ordered the party revoking to pay to the other "such costs as the Court should think reasonable and just," according to the terms of the rule or order (k). Where it appeared, however, that the arbitrator's authority had been revoked, merely because the party could not procure the attendance of a material witness before the arbitrator, the Court refused to make him pay costs (l). But now, by the recent act, 3 & 4 W. 4, c. 42, s. 39, it is enacted, "that the power and authority of any arbitrator or umpire

(z) *Soilleux v. Herbet*, 2 B. & P. 444.

(a) *Pedley v. Westmacot*, 3 East, 603. See *Harrison v. Grundy*, 2 Str. 1178, *contra*.

(b) *Cheesly v. Baily*, 1 Ld. Raym. 674, 1 Salk. 72, S. C. See Chit. Forms, 748, 749, 750.

(c) See *Rex v. Burridge*, 1 Str. 593; and see *Lowes v. Kermode*, 2 Moore, 30, 8 Taunt. 146, S. C.; *Green v. Pole*, 6 Bingham, 443.

(d) *Milne v. Gratix*, 7 East, 608; *King v. Joseph*, 5 Taunt. 452.

(e) *Clapham v. Higham*, 1 Bingham, 87.

(f) *Skee v. Cazon*, 10 B. & C. 483.

(g) *Lowes v. Kermode*, 2 Moore, 30, 8 Taunt. 146, S. C.; and see *Dicus v. Jay*, 6 Bingham, 519.

(h) *Warburton v. Storr*, 4 B. & C. 103.

(i) See *Aston v. George*, 2 B. & Ald. 395, 1 Chit. Rep. 200, S. C.

(k) See *Skee v. Cazon*, 10 B. & C. 483; *Morgan v. Williams*, 2 Dowl. P. C. 123.

(l) *Aston v. George*, 2 B. & Ald. 395, 1 Chit. Rep. 200, S. C.

appointed by or in pursuance of any rule of court, or Judge's order, or order of *Nisi Prius*, in any action now brought or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of record, shall not be *revocable by any party* to such reference without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a Judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the Court, or any Judge thereof, may from time to time enlarge the term for any such arbitrator making his award" (m). "

Besides this mode of revocation already mentioned, the authority of the arbitrator may be impliedly revoked, by the death of either party, or of only one of several parties, before the award is actually made (n), unless the submission contain an express stipulation to the contrary (o); and such a stipulation may be inserted with effect in an order of reference or rule of court (p). Even where a verdict is taken subject to the award, the death of a party after verdict, and before award made, is a revocation (q), unless, indeed, the submission expressly or impliedly provide the contrary (r). And where differences arose between the owners of a ship and the freighters, (the latter having distinct interests in the cargo,) and it was agreed between them that the matters in difference should be referred to arbitration: it was holden that the death of one of the freighters, before award made, only affected the award as to him, and was no revocation as to the others (s). The marriage of a *feme sole* party, after submission and before award made, is in like manner a revocation of the arbitrator's authority (t); but the bankruptcy of a plaintiff is not (u). Where the rights of the bankrupt having passed to his assignees, and the arbitrator having no power over the latter, and there consequently remaining no mutuality, the bankruptcy was held a revocation (v).

A parol submission, we have seen, cannot be made a rule of court. (*Ante*, 907) (x).

An agreement to refer matters in difference to arbitration does not

(m) See form of order permitting revocation, Chit. Forms, 751, and order, &c. for enlarging the term, *Id.* 754, 755.

(n) *Cooper v. Johnson*, 2 B. & Ald. 394; and see *Bristow v. Binns*, 3 D. & R. 184; *Louves v. Kermode*, 8 Taunt. 146; *Douse v. Coxe*, 3 Bingh. 20; *Edmunds v. Cox*, 2 Chit. Rep. 432.

(o) See *Biddell v. Douse*, 6 B. & C. 255; *Clarke v. Crofts*, 4 Bingh. 143, 12 Moore, 349, S. C.

(p) *Macdougall v. Robertson*, 1 M. & P. 147, 2 Y. & J. 11, S. C.

(q) See *Toussaint v. Hartop*, 7 Taunt. 571; and see *Tyler v. Jones*, 4 D. & R. 740, 3 B. & C. 144, S. C.; *Macdougall v.*

*Robertson*, 2 Y. & J. 11, 1 M. & P. 147, S. C.; but see *Bower v. Taylor*, 3 D. & R. 610 a.

(r) *Toussaint v. Hartop*, 7 Taunt. 571; and see *Biddell v. Douse*, 6 B. & C. 255; *Clarke v. Crofts*, 12 Moore, 349, 4 Bingh. 143, S. C.

(s) *Per 3 Justices*, MS. H. 1820. (t) *Charnley v. Winstanley*, 5 East, 266; and see *Marsh v. Wood*, 9 B. & C. 659, 661.

(u) *Andrews v. Palmer*, 4 B. & Ald. 250.

(v) *Marsh v. Wood*, 9 B. & C. 659.

(x) *Ansell v. Evans*, 7 T. R. 1; *Godfrey v. Wade*, 6 Moore, 488.

oust the Courts of law or equity of their jurisdiction, and the party thereto may commence proceedings notwithstanding (y); though he might be subject to a cross action if he has refused to enter into such arbitration. And if a reference be pending, and it has been agreed that it shall operate as a stay of proceedings, it may be made the subject of an application to the Court for staying the proceedings until an award be made. (*Ante*, 754).

## SECT. 2.

*The Award, &c.*

*Proceedings upon the reference.*] It is usual to have those persons sworn who give evidence before the arbitrator. For this purpose, before the recent act of 3 & 4 W. 4, c. 42, if the cause was referred at *Nisi Prius*, and the witnesses were in Court, each attorney wrote down the names of his witnesses, together with the name of the cause, upon a piece of paper, and gave it to the crier of the Court, who would thereupon swear the witnesses(z); the crier was paid 2s. for each witness. In other cases the like memorandum was made, stating also whether the persons to be sworn were parties in the cause or only witnesses. It was taken to the Judge's chambers, or to the Court at Westminster, and the Judge's clerk had the witnesses sworn, and gave a memorandum to that effect, signed by the Judge; 2s. were paid for each witness. This course may still be pursued as to witnesses; and, as to the parties themselves, it may be observed that they are not mentioned in 3 & 4 W. 4, c. 42, s. 41. By this enactment it is provided, "that when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required, to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath: and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly." If the witnesses or parties, however, be not sworn, yet, if no objection on that account be made before the arbitrator, the Court will not set aside the award (a).

The next step is to obtain an appointment from the arbitrator. If the cause have been referred at *Nisi Prius*, get the order of *Nisi Prius* from the associate, if the cause were tried at the assizes; or from the

(y) *Thompson v. Charnock*, 8 T. R. for the jurat, Chit. Forms, 751.  
139.

(z) See form of this memorandum

(a) *Ridoat v. Pye*, 1 B. & P. 91.

clerk of Nisi Prius, if it were tried in London or Middlesex. Then get an appointment in writing from the arbitrator, as to the time and place the parties and their witnesses are to attend before him (b); and make a copy of the order of nisi prius and appointment, and serve it on the opposite attorney; it is usual, also, at the same time to inform him if you purpose attending by counsel. If the cause were referred by rule of court, draw up the rule with the clerk of the rules, or if by Judge's order, draw up the order, as already mentioned; get an appointment from the arbitrator (b); and serve a copy of the rule or order and appointment, as above directed. In all other cases, a notice of the time and place appointed by the arbitrator will be sufficient. Care must be taken that it be ordered by the rule that all proceedings in the cause be stayed; otherwise the reference will be no stay of proceedings (c).

Each party is next to furnish the arbitrator with a state of his case, and a list of the witnesses he intends to produce. If briefs have been made out, and the arbitrator be a gentleman of the profession, this is usually done by delivering to him one of the briefs on each side.

Before the recent statute, there was no mode or power of compelling the attendance of a witness before an arbitrator, even where he had engaged to attend (d). But now, by 3 & 4 W. 4, c. 42, s. 40, where any reference has been made by rule or order, or submission as before mentioned, *ante*, 909, 910, it is enacted, that "it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any Judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of Court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served either together with or after the service of such rule or order: provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment of expenses and for loss of time, as for and upon attendance at any trial: provided also, that the application made to such Court or Judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such Court or Judge that such person cannot be found: provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order."

*Where it is requisite to resort to the above compulsory proceeding, an affidavit should be made of the submission of the existence of the reference, that the witness, or the production of the documents, is material, and that the party requiring the attendance and production cannot safely*

(b) See the form, Chlt. Forms, 953.

(c) R. T. 1 Ann.; 2 Ld. Raym. 789.

(d) *Wansall v. Southwood*, 4 M. & R.

359.

proceed without them, and also stating the residence of the witness (e). This should be laid before a Judge at chambers, and his order (f) obtained thereon for the attendance of the witnesses, as the arbitrator shall require, so that such attendance be not required at any other time than during two successive days mentioned in such order, which, it should be previously ascertained, will be convenient to the arbitrator. Or a motion should, upon such affidavit, be made to the Court, and a rule obtained for the attendance of the witness and production of the document. An appointment in writing of the time and place of attendance, in obedience to the order or rule signed by the arbitrator, or, if more than one, by one at least of the arbitrators, should be obtained (f). A copy of the order or rule and appointment should then be served upon the witness, a reasonable time before that appointed for the attendance, the originals being at the same time shewn to him, and a sum sufficient for his expenses and loss of time being paid or tendered to him at the same time. If the witness do not comply with the rule or order and appointment, he may be proceeded against as guilty of a contempt of Court. (See post, 931).

At the time appointed, the arbitrator hears the parties, or their counsel or attornies, and hears the evidence, in the same order as at a trial at *nisi prius*. There is a clause however in the rule and order of reference, authorizing the arbitrator to examine the parties themselves, on oath, if he thinks fit; and this has been holden to empower him to examine the plaintiff to a point, upon which no other evidence could be adduced on the other side (g). The mode of conducting the reference must in general be left to the arbitrator. He then proceeds to make his award.

*Award.*] The award is engrossed on 35s. stamped paper, and signed by the arbitrator in the presence of a witness. If it contain, however, 30 common law sheets or upwards (of 72 words each), it requires an additional stamp of 25s. for every 15 sheets above the first fifteen. (55 G. 3, c. 184) (h). It is usual to make out the award on stamped paper for the party in whose favour it is made, and to give copies merely, upon unstamped paper, to the others; unless the latter require originals signed and stamped as above mentioned (i). Where a cause was referred to three arbitrators, with a power to them or any two of them to make an award, an award made by two of them was holden good, it appearing that the third had notice of the meetings, &c. (j). When the award is made, the arbitrator gives notice to the attornies of the parties that it is ready, and that each of them may have his part on the day therein specified, on payment of the expenses. After the award is delivered (k), or after notice given by the arbitrator of its being ready for delivery (l),

(e) See Chit. Forms, 752.

(f) Chit. Forms, 753.

(g) *Warne v. Bryant*, 5 D. & R. 301, 3 B. & C. 590, S. C.

(h) See *Goodson v. Forbes*, 6 Taunt. 171. What an award within the act,

see *Jebb v. M<sup>r</sup> Kiernan*, 1 M. & M. 340.

(i) See forms of awards, Chit. Forms, 755 to 761.

(j) *Dalling v. Matchett*, Willes, 215.

(k) *Irvine v. Elnon*, 8 East, 54.

(l) *Hemfree v. Bromley*, 6 East, 309.

no mistake in it, in the calculation of figures, or in the sum awarded, &c. can be corrected (m), unless with the consent of both the parties (n).

*Time for making it enlarged.]* If it be necessary that the time limited for making the award should be enlarged, *the arbitrator may enlarge it as a matter of course, if a power be given him for that purpose in the submission or order*; but notice should be given to the parties of his having done so (o). The mode of enlarging the time in this case, however, depends entirely on the terms of the submission or order (p).

If no such power was given, but the parties on both sides consent to the time being enlarged, then, if the cause be referred at *Nisi Prius* or by a Judge's order, or if the submission contain a clause of assent that it be made a rule of Court, the time is enlarged thus:—*Move to make the order or submission a rule of Court; draw up the rule with the clerk of the rules, and serve a copy of it on the opposite attorney; get motion papers (to enlarge the time for making the award) signed by the counsel of each party, and take them to the clerk of the rules, who will thereupon draw up the rule (q); then get another appointment on the rule from the arbitrator, and serve a copy of this rule and appointment on the opposite attorney.* Where the cause is referred under a rule of court, and the parties thus consent to the enlargement, *get the motion papers signed by counsel (r), draw up the rule, and serve a copy of the rule and appointment, as above directed.* In all other cases of consent, a consent in writing by the parties will be sufficient (s); unless the submission was by deed, in which case the consent must be by deed (t).

If no such power was given to the arbitrator, and one of the parties would *not* consent to the enlargement of the time, then, previously to the 3 & 4 W. 4, c. 42, s. 39, there was no mode of enlarging the time; now, however, by that act (*ante*, 910), in case of a reference by rule of court, order of *Nisi Prius*, Judge's order, or submission, containing an agreement that it shall be made a rule of court, a power is given to the Court or a Judge to enlarge the time for making the award, although one of the parties refuses his assent to such enlargement. And even, it should seem, if the parties submitting stipulate expressly that no award is to be made after the period mentioned in the submission, they cannot deprive the Court or a Judge

(m) See *Ward v. Dean*, 2 B. & Adol. 234; *Hall v. Alderson*, 2 Bingh. 476.

(n) *Ex p. Cuerton*, 7 D. & R. 774.

(o) *Hilton v. Hopwood*, 1 Marsh. 6.

(p) See *Reid v. Fryatt*, 1 M. & Sel. 1; *Davies v. Vass*, 15 East, 97; *Payne v. Deakle*, 1 Taunt. 509; *Barrett v. Parry*, 4 Id. 658. A submission by which an award is to be made on or before the — day of —, or any other day to which the submission may be enlarged, is a general authority to be executed in

a reasonable time. *M'Dougall v. Robertson*, 2 Y. & J. 11, 1 M. & P. 147, S. C.

(q) See form of rule, Chit. Forms, 754.

(r) See *Halden v. Glascock*, 5 B. & C. 340; *Dickins v. Jarvis*, Id. 528.

(s) See *Evans v. Thomson*, 5 East, 189. See the form, Chit. Forms, 754.

(t) *Brown v. Goodman*, 3 T. R. 592, n.; *Greig v. Talbot*, 2 B. & C. 185, 188; *Res v. Bingham*, 3 Y. & J. 101, 113.

of the jurisdiction given by this enactment (x). *The application for this enlargement should be made by motion to the Court, (the rule in the first instance being to shew cause), or by summons before a Judge.*

If by the order of *Nisi Prius*, or the Judge's order, a power is given to the arbitrator to enlarge the time for making the award until such ulterior day as he shall appoint in writing under his hand, to be indorsed on that order, and the Court, or a Judge thereof, shall order, it is necessary, at all events before making the award, if not before the time limited for making the enlargement, to obtain a Judge's order ratifying that enlargement, otherwise the award would be bad (y).

An objection that the time for making an award has not been duly enlarged, is, it should seem, waived by proceeding in the reference with a knowledge of that fact (z).

In a late case, where a verdict was taken for 3000*l.*, subject to an award to be made by a certain day as to the amount of damages, and the arbitrator accidentally let the day pass without making his award, and the defendant's attorney would not consent to the time being enlarged, the Court granted liberty to the plaintiff to enter up judgment, and issue execution forthwith for the whole amount of the verdict, unless the enlargement were consented to (a).

*Umpire.*] Where a matter is referred to two or more arbitrators, it is usual to provide in the submission, that if the arbitrators shall not agree upon their award before a time therein specified, an umpire shall be appointed, by whose award the parties shall abide. This umpire is either named in the submission, (which is much the preferable mode), or the arbitrators are therein given a power to appoint one generally. In the latter case, the arbitrators may appoint the umpire at any time before or after the time limited for them to make their award, provided it be before the time limited for the umpire to make his umpirage (b); and they may do so even before they have themselves entered upon an examination of the matter referred to them (c). Where, by the terms of a reference, the arbitrators were to appoint an umpire previously to their entering on the consideration of the matters referred, and to make their award before a certain day, or such time as they and the umpire, or any two of them, should appoint; and the arbitrators before appointing an umpire enlarged the time for making their award, and afterwards held a meeting at which the parties attended; the Court of Common Pleas held, that the parties being aware of these facts, and having afterwards attended, could not now make any objection on the ground of the enlargement of the time having been made before the appointment (d).

(x) For the summons and order, see *Chit. Forms*, 755.

(y) *Wrason v. Wallis*, 10 B. & C. 107.

(z) *Lawrence v. Hodson*, 1 Y. & J. 16; *Re Hick*, 8 Taunt. 694; *Matson v. Trower*, R. & M. 17; *Leggett v. Finlay*, 3 M. & P. 629, 6 Bing. 255, S. C.

(a) *Taylor v. Gregory*, 2 B. & Adol. 774.

(b) *Harding v. Watts*, 15 East, 556;

*Smailes v. Wright*, 3 M. & Sel. 559. See *Sprigons v. Nash*, 5 M. & Sel. 193; *Re Hick*, 8 Taunt. 694.

(c) *Roe d. Wood v. Doe*, 2 T. R. 644; but see *Reynolds v. Gray*, 1 Ld. Raym. 222, 1 Salk. 70, S. C.

(d) *Re Hick*, 8 Taunt. 694; and see *Matson v. Trower*, R. & M. 17; *Lawrence v. Hodson*, 1 Y. & J. 16; *Leggett v. Finlay*, 3 M. & P. 629, 6 Bingh. 255, S. C.



The appointment of the umpire must not be decided by chance; and where the umpire was chosen by lot, the Court set aside the award on that account (*e*). But under particular circumstances such an appointment has been held good (*f*).

Although the office of arbitrator is determined by the appointment of the umpire (*g*), yet if the arbitrators appoint an umpire who refuses to act, they may afterwards appoint another (*h*); or if they join with the umpire in his umpirage; it is only surplusage, and will not vitiate the instrument (*i*).

The umpirage, like the award, must be ready to be delivered within the time limited for it. Where, by deed of arbitration, dated 1st June, the arbitrators were to make their award on or before the 1st October, with power, in case they should not agree in making their award within the time, to appoint an umpire, and his award to be binding, so as it were made within six months after the date of his appointment; and the arbitrators appointed an umpire within the time allowed to them, who made his umpirage within six calendar, but not within six lunar months, of his appointment, the Court held that the umpirage was ill made (*j*).

No stamp is requisite to the appointment of the umpire (*k*).

*Costs.*] Where there is no cause in Court, the award as to costs depends entirely upon the terms of the submission; if the submission give the arbitrator no authority as to costs, he cannot award them (*l*). But where authority is given to him upon that subject, he may order either party to pay the costs, or each to pay a moiety, unless the submission require that the costs abide the event; or if the award be silent as to costs, each party must pay his own costs, and the costs of the reference equally.

Where there is a cause in Court, the award, as to the costs of the reference, depends upon the terms of the rule or order under which the cause is referred, in the same manner as where there is no cause in Court, as above mentioned; and if the rule or order give the arbitrator no authority as to costs, he cannot award them (*m*). But if, by the rule or order of reference, the costs (generally) are to abide the event, this includes the costs of the reference as well as the costs of the cause, according to the practice of this Court (*n*); although the

(*e*) *Ford v. Jones*, 3 B. & Adol. 248, 10 Law Jour. 104, S. C.; *Young v. Miller*, 5 D. & R. 263, 3 B. & C. 407, S. C.; *Wells v. Cooke*, 2 B. & Ald. 218; *Re Cassell*, 9 B. & C. 624.

(*f*) 16 East, 51.

(*g*) *Reynolds v. Gray*, 1 Ld. Raym. 222, 1 Salk. 70, S. C.; and see *Mitchell v. Harris*, 1 Ld. Raym. 671, 1 Salk. 71, S. C.; 2 Saund. 133 a.

(*h*) See *Oliver v. Collings*, 11 East, 367.

(*i*) *Bates v. Cook*, 9 B. & C. 407; *Beck v. Sargent*, 4 Taunt. 232; *Soulsby*

*v. Hodgson*, 1 W. Bl. 463; and see generally, 2 Saund. 133, (n. 7).

(*j*) *Re Swinford*, 6 M. & Sel. 226.

(*k*) *Routledge v. Thornton*, 4 Taunt. 704.

(*l*) See *Candler v. Fuller*, Willes, 64; *Bell v. Bellson*, 2 Chit. Rep. 157; *Firth v. Robinson*, 1 B. & C. 277.

(*m*) *Firth v. Robinson*, 1 B. & C. 277; *Candler v. Fuller*, Willes, 64; *Strutt v. Rogers*, 7 Taunt. 213. See *Grove v. Cox*, 1 Taunt. 165; *Mackintosh v. Blyth*, 1 Bingh. 269, 8 Moore, 211, S. C.

(*n*) *Wood v. O'Kelly*, 9 East, 436.

rule is otherwise in the Court of Common Pleas (o); or where other matters not in the cause are referred (p). And generally the costs of a reference are costs in the cause, where the reference is entirely for the benefit of the unsuccessful party (q). Where the arbitrator awarded the costs of the reference, but did not specify the sum, the Court of Common Pleas also held that it might be ascertained by the prothonotary (r); and in other cases, where the sum was specified, that Court held that it was examinable by the officer of the Court, who might reduce it if he thought it exorbitant (s). If each party be ordered to pay a moiety of the costs of the reference, one of them may pay the entire sum, in order to get the award from the arbitrator; and he may afterwards have the same remedy against the other if he refuse to repay his moiety, as he would have for the non-performance of any other part of the award (t). In practice, however, in order to obviate all questions upon this point, it is usual, in the award, to order the party, in whose favour the award is made, to pay the entire costs of the award in the first instance, and then that the other party shall repay him a moiety of them.

But as to the costs of the *action*, the arbitrator may order either party to pay them, without any express authority being given to him upon that subject by the rule or order of reference (u). If by such rule or order, however, the costs are "to abide the event," the arbitrator cannot exercise any discretion in the awarding of them; but the party, who would have been entitled to costs if the action had proceeded, shall be entitled to them under the award (x); and to the same amount, and under the same circumstances; and therefore, if the defendant, from the amount of the damages awarded, would have been entitled to enter a suggestion on the roll under the courts of conscience acts, if a verdict for the same amount had been given, he shall be entitled to costs under the award; or where a plaintiff in trespass would be entitled only to as much costs as damages, he shall have no more under the award (y). When the cause goes off upon an ineffectual arbitration, and is afterwards tried, costs are allowed as upon a remanet (z).

Lastly, as to the *taxation* of the costs awarded: If the arbitrator have not awarded a gross sum for costs, but costs generally, with or

(o) *Bradley v. Tunstow*, 1 B. & P. 34. See *Broune v. Marsden*, 1 H. Bl. 223; *Candler v. Fuller*, Willes, 64.

(p) *Tregoning v. Attenborough*, 1 Dowl. P. C. 225, 5 M. & P. 453, 7 Bingh. 733, S. C. See *Mackintosh v. Blyth*, 8 Moore, 211, 1 Bingh. 269, S. C.

(q) *Taylor v. Gordon*, 1 Dowl. P. C. 720.

(r) *Barrett v. Parry*, 4 Taunt. 658.

(s) *Fitzgerald v. Graves*, 5 Taunt. 342; *Müller v. Robe*, 3 Id. 461; *Cor. Tenderden*, C. J., at Chambers, 8th March, 1832.

(t) *Hicks v. Richardson*, 1 B. & P. 93.

(u) *Roe d. Wood v. Doe*, 2 T. R. 644; *Firth v. Robinson*, 1 B. & C. 277. See

*Lewis v. Harris*, 4 D. & R. 129, 2 B. & C. 620, S. C.; *Rigby v. O'Kell*, 7 B. & C. 57.

(x) See *Highgate Archway Company v. Nash*, 2 B. & Ald. 597.

(y) *Swinglehurst v. Altham*, 3 T. R. 138, 139; *ante*, 861. See upon this subject generally, *Hullock*, 417 to 432; *Finlayson v. M'Leod*, 1 B. & Ald. 663; *Pratt v. Hillman*, 6 D. & R. 481; *Rigby v. O'Kell*, 7 B. & C. 57; *Stratton v. Green*, 1 M. & Scott, 668, 8 Bingh. 437, S. C.; *Spiry v. Webster*, 2 Dowl. P. C. 46.

(z) *Burchall v. Ballamy*, 5 Bur. 2694; *Sayer, Costs*, 179, S. C.; *Tidd*, 9th ed. 833.

without any express direction as to their being taxed by the master, —move to make the order or submission a rule of Court; draw up the rule with the clerk of the rules, and get an appointment at the foot of it from the master; give the usual one day's notice of taxation; serve a copy of the rule and appointment on the opposite attorney; and at the time appointed attend before the master, who will tax the costs and mark them on the rule. If the arbitrators award the defendant to pay the plaintiff his costs of suit, to be taxed by the proper officer before a particular day, it is the defendant's business to have them taxed before that day (a); and if he do not, the plaintiff may, it seems, proceed to have them taxed *ex parte* (b).

*Arbitrator's authority, how determined.*] The arbitrator, as soon as he has made his award, is *functus officio*, and cannot afterwards alter it in any material part. (*Ante*, 913, 914). So, if he do not make his award within the time limited by the rule, order, or submission, or within the enlarged time (if the time have been enlarged), any award made by him afterwards will be void. (*Post*, 920). So, by the appointment of an umpire, (*ante*, 916), or by an express revocation of the submission, (*ante*, 909), or by an implied revocation of it, (*ante*, 910), the authority of the arbitrator is determined.

### SECT. 3.

#### *Setting aside the Award.*

*In what cases.*] It may be necessary to premise that the Court will not enter into an examination of the merits, upon an application to set aside an award (c), unless it appear manifestly from the merits that the arbitrators have acted dishonestly or corruptly (d), for the parties having chosen to substitute the decision of an arbitrator for that of a judge and jury, must abide by his determination in matters of law as well as of fact (e). But, with this exception, every ground for relief against an award, in a Court of equity, is equally available in a Court of common law (f). The following are the most usual defects, for which an award may be set aside :

If the award do not pursue the submission in every material point, the Court will set it aside (g). As where an arbitrator awarded payment of a debt, which did not accrue until after the parties had entered into the submission, the Court set aside the award (h); but the

(a) *Candler v. Fuller*, Willes, 62; *Bigland v. Kelton*, 12 East, 436.

(b) *Sadler v. Robins*, 1 Camp. 253.

(c) *Lucas v. Wilson*, 2 Bur. 701; *Anderson v. Coxeter*, 1 Str. 301.

(d) 1 Saund. 327 d.

(e) See *Sharman v. Bell*, 5 M. & Sel.

504; *Richardson v. Nourse*, 3 B. & Ald. 237, 1 Chit. Rep. 674, S. C.

(f) *Rex v. Wheeler*, 3 Bur. 1259.

(g) *Henderson v. Williamson*, 1 Str. 116.

(h) *Banfill v. Leigh*, 8 T. R. 571.

Court will not presume that fact; it must be proved (i). So, where there was an agreement for a lease of a coal mine for 63 years from the 1st May, 1801, the lessee to be allowed three years from that time for winning the colliery, without payment of rent; and an arbitrator, being authorized to give such directions for a lease, according to the terms of the agreement, as he should think fit, directed a lease for 63 years from the 1st May, 1804: it was holden that he had exceeded his authority, and that the award was consequently bad (k). So, if there be a submission of a particular difference, and there are other things in controversy, if in such a case a general release is awarded, the award is bad; but it must be shewn that there were such other matters to avoid the award (l). Also, if the arbitrator decide upon more matters than were submitted to him, the award will be bad; as if, by the terms of the submission, he have to determine the boundaries of certain lands, and he enter into the question of title, and decide upon it; or the like (m). But where upon a submission of all matters in difference, by partners, the arbitrator awarded that the partnership should be dissolved, it was holden good (n). So, where a debtor paid his creditor a sum of money, and the creditor commenced an action against him upon a further claim, and they submitted all matters in difference to arbitration; the Court held that the arbitrator in his award might order the plaintiff to repay a part of the sum which the defendant had paid him, it appearing to have been paid in a mistake (o). And where the question submitted was, whether A. or B. had the right to the tithes of certain lands, an award of undivided moieties to both was holden good (p). If an award be made in favour of a person who is a stranger to the submission, it will be bad, unless it be for the advantage of one who is a party to it (q); and the same of course, if made against a stranger. An award, whereby the arbitrator assumes to reserve a power over future differences, and which power is not given him by the award, is bad (r). So, where several matters are submitted, and the arbitrator omits to decide on one or more of them (s); or where all matters in difference are submitted, and the arbitrator omits to decide as to some one matter which has been pointed out to him (t); the Court will set aside the award. But no other matters in difference than those decided on will be intended by the Court, unless they have been made known to the arbitrator before he made his

(i) *Id.*

(k) *Bonner v. Liddoll*, 1 B. & B. 80.

(l) *Hill v. Thorn*, 2 Mod. 309.

(m) See *Doe d. Lord Carlisle v. Bailiff of Morpeth*, 3 Taunt. 378.

(n) *Green v. Waring*, 1 W. Bl. 475.

(o) *Malcolm v. Fullarton*, 2 T. R. 645.

(p) *Prosser v. Goringe*, 3 Taunt. 426.

(q) *Bedam v. Clarkson*, 1 Ld. Raym. 123; *Ecclestone v. Mahard*, Cro. El. 4; 5 Co. 78; *Bretton v. Prat*, Cro. El. 758;

*Bird v. Bird*, 1 Salk. 74; *Fisher v. Pimbley*, 11 East, 188; *Ingram v. Milnes*, 8 East, 445; and see 1 Ro. Abr. 249, pl. 15.

(r) *Manzer v. Heaven*, 3 B. & Adol. 295.

(s) *Re Robson*, 1 B. & Adol. 723; *Randall v. Randall*, 7 East, 80; *Bradford v. Bryan*, Willes, 268; but see *Simmonds v. Swaine*, 1 Taunt. 549; and see 1 B. & Ald. 106.

(t) *Mitchell v. Staveley*, 16 East, 58.

award (*u*). A submission to refer a cause, and the subject matter thereof, and the issue therein, to an arbitrator, does not authorize him to order a verdict to be entered up (*x*).

If the award be not made and delivered, or be ready for delivery, by the time limited in the submission, and according to the terms of it, or within the enlarged time (when the time has been properly enlarged), any award made afterwards will be bad (*y*).

If there be any uncertainty in a material part of the award, at least if it do not contain certainty to a common intent (*z*), it is bad (*a*). An award that *A. or B.* shall do an act, is void for uncertainty (*b*). Upon a reference, to a surveyor, of a cause and all matters in difference, an award that defendant had overpaid plaintiff 34*l.* was held insufficient to entitle the plaintiff to enforce the award by attachment (*c*). But a *prima facie* uncertainty or want of conclusiveness in an award does not vitiate it, if it be capable of being rendered certain or conclusive, and the award may be bad or good, according to the event (*d*). Where an award ordered that the defendant should do one or other of two things, in the alternative, it was holden that the award was good, if either of the things were capable of being performed (*e*). So, where a sum of money was ordered to be paid within a certain time from the date of the award, and the award bore no date, it was holden to be sufficiently certain (*f*). So, where a bond was ordered to be delivered up to be cancelled within a certain time from the date of the said bond, without stating the date, it was considered sufficient (*g*). So, where an action on a money bond, and all matters in difference, were referred to an arbitrator, and he directed a verdict to be entered for the plaintiff generally: it was holden sufficient, although he did not state for what amount (*h*). Where a plaintiff makes several claims against a defendant, and the defendant makes others against the plaintiff, if an arbitrator to whom the cause is referred finds that the plaintiff had no cause of action, his award is, in that respect at least, sufficiently certain (*i*). In an action against an executor, where the arbitrator found a certain sum due to the plaintiff on the balance of accounts, and awarded that the defendant should pay it out of assets on a given day: this was holden to be sufficiently certain,

(*u*) *Ingram v. Milnes*, 8 East, 445. See *Smith v. Johnson*, 15 East, 13; *Pinkerton v. Caslon*, 2 B. & Ald. 704.

(*x*) *Hutchinson v. Blackwell*, 8 Bingh. 331, 1 Dowl. P. C. 267, S. C.; see *vide Cartwright v. Blackworth*, 1 Dowl. P. C. 489, which shews the Court would enforce the performance of such an award.

(*y*) See *Marks v. Marriot*, 1 Ld. Raym. 115; *Freeman v. Barnard*, Id. 247, 1 Salk. 69, 3 Id. 45, S. C.; *Brown v. Vawser*, 4 East, 584; *Henfry v. Bromley*, 6 East, 310; *ante*, 918.

(*z*) *Hawkins v. Colclough*, 1 Bur. 274.

(*a*) See *Tipping v. Smith*, 2 Str. 1024.

(*b*) *Lawrence v. Hodgson*, 1 Y. & J. 16; and see *Edgell v. Dalmore*, 11

*Moore*, 541, 3 Bingh. 634, S. C.; the award in the latter case ought to have directed the sum to have been paid by plaintiff to defendant.

(*c*) *Thornton v. Hornby*, 8 Bingh. 13.

(*d*) *Aitcheson v. Cargey*, 13 Price, 639; 2 B. & R. 170, 2 D. & R. 222, S. C.

(*e*) *Simmonds v. Swaine*, 1 Taunt. 549.

(*f*) *Armitt v. Breame*, 1 Salk. 76, 2 Ld. Raym. 1076, S. C.

(*g*) *Bell v. Gipps*, 2 Ld. Raym. 1141.

(*h*) *Cayme v. Watts*, 3 D. & R. 224; and see *Cargey v. Aitcheson*, 2 B. & C. 170, 2 D. & R. 222, 13 Price, 639, S. C.; *Dicas v. Jay*, 5 Bingh. 281, 2 M. & P. 448, S. C.

(*i*) *Hayllar v. Ellis*, 6 Bingh. 225.

without stating expressly that the defendant had assets to that amount (*j*). So, in the common cases of costs, where their amount is not ascertained by the award, still this circumstance does not render the award bad for uncertainty; the maxim in these and the like cases being, "*Id certum est quod certum reddi potest*" (*k*).

The award must be a final settlement of the matters referred; otherwise it will be bad (*l*). Therefore, where the defendant was ordered to pay the plaintiff a sum of money, unless within 21 days (which would be after the time limited for making the award) he should exonerate himself by affidavit from certain payments, &c., in which case he was to pay a less sum; the award was holden bad (*m*). So, where the award was, that the defendant should beg the plaintiff's pardon, in such manner and place as the plaintiff should appoint, it was holden bad; for the manner and place, which were the most material circumstances, were yet to be determined (*n*). But where the parties bound themselves to abide by the opinion of counsel on the construction of a statute, and the counsel gave his opinion in favour of one of the parties, it was holden that this opinion was final and conclusive, notwithstanding it also recommended that the printed statute should be compared with the parliament roll, before the matter should be settled (*o*). So an award that one of the parties should pay a sum of money to the other, on a future day, in full of all demands, is sufficiently final (*p*); and an award that one should give the other his promissory note for a certain sum, is good, being the same as awarding payment at a future day (*q*). So, where the award was, that an action pending between the parties should be discontinued, and that each should pay his own costs, it was considered sufficiently final, being in effect an award of a *stet processus* (*r*). So where, by an order of *Nisi Prius*, an action at law and all matters in difference between the parties at law and in equity, including a Chancery suit, were referred to an arbitrator, who by his award ordered that a sum of money should be paid to the plaintiff in the action, and that the bill in Chancery should be dismissed, and that all proceedings thereon should utterly cease and determine; the Court of King's Bench held that the suit in equity, and all matters in difference in that suit, and all matters in difference between the parties, were thereby finally determined; although one of the matters in dispute in the Chancery suit was brought before the arbitrator, as a matter in difference between the parties, and was not otherwise disposed of than by the ending of the Chancery suit (*s*).

(*j*) *Love v. Honeybourne*, 4 D. & R. 814; and see *Doe d. Williams v. Richardson*, 8 Taunt. 697.

(*k*) See *Cargay v. Aitcheson*, 2 D. & R. 222, 2 B. & C. 170, S. C.; and vide *Barrett v. Parry*, 4 Taunt. 658.

(*l*) See *Tipping v. Smith*, 2 Str. 1024; *Re Cargay v. Aitcheson*, 2 D. & R. 222, 2 B. & C. 170, S. C.; *Doe d. Turnbull v. Brown*, 5 B. & C. 384; *Maner v. Heaver*, 2 B. & Adol. 295.

(*m*) *Pedley v. Goddard*, 7 T. R. 73.

(*n*) *Glover v. Barrie*, 1 Salk. 71.

(*o*) *Price v. Hollis*, 1 M. & Sel. 105.

(*p*) *Squire v. Grevett*, 2 Ld. Raym. 961; *Robinet v. Cobb*, 3 Lev. 188.

(*q*) *Booth v. Garnett*, 2 Str. 1082.

(*r*) *Blanchard v. Lilly*, 9 East, 497; and see *Jackson v. Tabeley*, 5 B. & Ald. 848.

(*s*) *Pearse v. Pearse*, 9 B. & C. 484.

If one part of an award be inconsistent with another, it will be bad. As, where the arbitrator awarded that *A.* should pay *B.* 100*l.*, and both should give general releases; and that at a subsequent time *B.* should pay *A.* 20*l.*: the award was holden bad (*s.*). So, if the award be ineffective, as if upon a submission for a partition between tenants in common, the arbitrator award their several portions, but omit to order deeds of conveyance to be executed, so as to vest the several allotments in their respective owners, the award is bad (*t.*). Also, if the arbitrator award any of the parties to do an act which is illegal, the award is bad (*u.*).

Where the award was written on a wrong stamp, the Court refused to set it aside upon that account; although such a circumstance would be a good answer to any application made to enforce it (*x.*).

If there have been any irregularity in the proceeding,—as if no notice of the meeting were given to the party against whom the award was made, or the like,—the Court will set aside the award (*y.*).

If the arbitrator have been guilty of any gross misconduct in the course of the proceedings, the Court will set aside the award (*z.*); but such misconduct will not, it seems, afford a defence to an action, &c. Where an arbitrator refused to receive evidence, the Court set aside the award (*a.*). But where he refused to examine a witness because he thought him inadmissible, the Court refused to set aside an award (*b.*). Where the arbitrator, after closing the examination, refused to call another meeting, and made his award; the Court refused to set aside the award, although the defendant's attorney swore that he was in possession of evidence which would have repelled that upon which the award was founded (*c.*). So, where the umpire received the evidence from the arbitrators, without examining the witnesses, the Court held that the award was not bad on that account, if the umpire had not been requested to examine them (*d.*). So, where one of the defendant's witnesses, was examined by the arbitrator, after the evidence on both sides was closed, and the plaintiff's attorney gone; although upon this second examination he gave a different evidence from what he had given before, and the arbitrator's decision was influenced by it: yet the Court held that this circumstance would not affect the award, unless it were brought about by the management of the defendant's attorney (*e.*). If the arbitrator make a mistake in point of law, and it do not appear upon the face of the award, the Court will not set aside the award upon a mere suggestion of the

(*s.*) *Storke v. De Smeth*, Willes, 66. See *Figes v. Adams*, 4 Taunt. 632; *Ames v. Milward*, 8 Id. 637.

(*t.*) *Johnson v. Wilson*, Willes, 248.

(*u.*) See *Alder v. Savill*, 5 Taunt. 454.

(*x.*) *Preston v. Eastwood*, 7 T. R. 95.

(*y.*) *Anon.* 1 Salk. 71.

(*z.*) See *Lucas v. Wilson*, 2 Bur. 701; *Anon.* 1 Salk 71; *Braddick v. Thomson*, 8 East, 344; *Gragebrook v. Davis*, 5 B. & C. 534; *Brazier v. Bryant*, 14 Moore,

587, 3 Bingh. 167, S. C.; 9 & 10 W. 3, c. 15, s. 3.

(*a.*) See *Morris v. Reynolds*, 2 Ld. Raym. 857, 1 Salk. 73, S. C.; *Hewlett v. Haycock*, 2 C. & P. 574.

(*b.*) 1 Price, 81.

(*c.*) *Ringer v. Joyce*, 1 Marsh. 404; but see *Dodington v. Hudson*, 1 Bingh. 384.

(*d.*) *Hall v. Lawrence*, 4 T. R. 589.

(*e.*) *Atkinson v. Abraham*, 1 B. & P. 175. See *Re Hick*, 8 Taunt. 694.

mistake, or upon affidavits of the facts (*f*); but if the mistake appear upon the face of the award, or even upon the face of another paper delivered with it (*g*), the award will be set aside.

If an award be good in part, the performance of that part which is good may be enforced, provided it be final in itself and perfectly distinct from, and independent of, that part which is bad (*h*). In a late case, where the arbitrator assumed in one part of the award to reserve a power over future differences, but the rest of the award was good, the Court rejected the improper part, and held the award good (*i*). An award of a release to the time of the award was formerly holden to be void *in toto*, not being divisible; but now, in this case, an award of a release which would extend beyond the arbitrator's power is held only to be void for the time between the submission and the award (*k*). Where an arbitrator, to whom a cause before being at issue was referred by rule of court, awarded thus:—"I award and direct that a verdict in this cause be finally entered for the plaintiffs, with £— damages;" the Court held he had exceeded his authority in directing the entry of a verdict, and that, as the award consisted of only one sentence, that direction could not be rejected, and the residue considered as an award that so much was due and to be paid, and that therefore the award was bad (*l*).

An objection to the award being made on account of the time for making it not having been duly enlarged, or to an umpirage on account of the umpire not having been duly appointed, or on account of improper conduct in the arbitrator or umpire, or the like, may be waived by the parties attending the arbitrator or umpire, and proceeding in the reference or umpirage with a knowledge of the fact (*m*).

Lastly, if a party accept a benefit under an award,—as for instance, if an award direct, amongst other things, that the costs of the cause, and of the reference, be paid to the plaintiff, and he accept such costs,—he is thereby precluded from afterwards impeaching the award (*n*).

*How.*] Where no action is pending, and where the submission does not contain a clause of assent that it shall be made a rule of court, the award cannot be set aside by any application to this Court; but if the party grieved cannot avail himself of the defects in it by pleading, where an action is brought against him upon the bond, &c., his

(*f*) *Chace v. Westmore*, 13 East, 357; *Boutillier v. Thick*, 1 D. & R. 366; *Cramp v. Symons*, 1 Bingh. 104; *Craven v. Craven*, 7 Taunt. 644; *Delver v. Barnes*, 1 Taunt. 48; and see *Sharman v. Bell*, 5 M. & Sel. 504; *In re Badger*, 2 B. & Ald. 691; *Richardson v. Nourse*, 3 Id. 237, 1 Chit. Rep. 674, S. C.; *Gonsham v. Germain*, 11 Moore, 7.

(*g*) *Kent v. Elstob*, 3 East, 18.

(*h*) *Candler v. Fuller*, Willes, 64, 253; *Addison v. Gray*, 2 Wils. 293; *Ingram v. Milnes*, 8 East, 445; *George v. Lausley*,

*Id.* 13. See *Doe d. Williams v. Richardson*, 8 Taunt. 697.

(*i*) *Manser v. Heaver*, 3 B. & Adol. 295.

(*k*) *Pickering v. Watson*, 2 Bla. Rep. 1117; and see *Watson on Awards*, 138, &c.

(*l*) 1 M. & Y. 200; and see *Res v. Washbrooke*, 7 D. & R. 221.

(*m*) See *ante*, 922, 915, and see *Hewlett v. Laycock*, 2 C. & P. 574.

(*n*) *Kennard v. Harris*, 4 D. & R. 272, 2 B. & C. 801, S. C.



only remedy is by application to a Court of equity. But where an action is pending, or where the submission contains the clause above-mentioned, the award may be set aside upon application to the Court.

If, indeed, the award be altogether a nullity, for instance, if it be made after the submission has been revoked, the Court will not in general interfere to set it aside, for it cannot be enforced; but where a verdict is taken subject to an award, and the arbitrator has the power of ordering for what sum the verdict shall be entered, in that case, if the award be a nullity, the Court, upon application, will set it aside; for otherwise, the party in whose favour the award is made would have judgment upon the verdict without any new proceeding to enforce the award (o).

Where the submission contains the clause of assent above-mentioned, this application must be made before the last day of the term next after the award is made; (9 & 10 W. 3, c. 15, s. 2); even an application that the award be referred back to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him when he made it, must be made within that time (p). If the award be made in vacation, the application to set it aside must be made in the next term; but if made in term, the parties have until the last day of the second term to make the application (q). Also, it cannot be made on the last day of term (r); nor will the Court, after the time above mentioned, entertain a motion to set aside an award, for any defect whatever (s), even although such defect appear upon the face of the award (t). This statute, however, does not extend to awards, where the reference has been by order of *Nisi Prius* (u), nor to other cases where an action is pending (x); yet the Court will not in such cases entertain the motion after any considerable lapse of time (x); and if a verdict have been taken, the application must of course be made within the time limited for the motion in arrest of judgment or for a new trial, as already noticed, *ante*, 824, 852 (z).

*First move to make the order or submission a rule of court (a); and then, within the time above-mentioned, get counsel to move for a rule to shew cause why the award should not be set aside, upon an affidavit of the facts necessary to sustain the objections intended to be made; but if it be intended to object to the award, merely for defects appearing upon the face of it, an affidavit will be unnecessary.* As to the title of the affidavits in this case, see *ante*, 900. By R. E. 2 G. 4, (4 B. & Ald.

(o) *Doe d. Turnbull v. Brown*, 5 B. & C. 384; and see *Manser v. Heaver*, 3 B. & Adol. 295.

(p) *Zachary v. Shepherd*, 2 T. R. 781.

(q) *Re Burt*, 5 B. & C. 668.

(r) *Fream v. Pinneger*, Cowp. 23.

(s) *Pedley v. Goddard*, 7 T. R. 73.

(t) *Loundes v. Loundes*, 1 East, 276.

(u) *Synge v. Jervoise*, 8 East, 466; *Lucas v. Wilson*, 2 Buz. 701; *Manser v. Heaver*, 3 B. & Adol. 295; *Rawsthorne v. Arnold*, 6 B. & C. 629.

(z) *Rogers v. Dallimore*, 6 Taunt.

111, 1 Marsh. 471, S. C.

(z) *Rawsthorne v. Arnold*, 6 B. & C. 629; *Borrowdale v. Kitchen*, 3 B. & P. 244; *Kennard v. Harris*, 2 B. & C. 801, 4 D. & R. 272, S. C.

(a) 9 & 10 W. 3, c. 15, s. 2. *Clapham v. Hyham*, 7 Moore, 403, 1 Bingham, 87, S. C. See also *Kirkcuso v. Hudson*, 3 Moore, 64, 8 Taunt. 733. Where the original order was lost by the arbitrator's negligence, the Court allowed a copy of it to be made a rule of Court, *Thomas v. Philby*, 2 Dowl. P. C. 145.

539, 2 Chit. Rep. 3761, the objections intended to be insisted upon at the time of making the rule absolute must be stated in this rule to shew cause. It is necessary, therefore, that the counsel should indorse these objections on his brief, before he sends it in to the officer of the court. But this rule, as to stating the objections in the rule *nisi*, does not apply to a case where you move to set aside a judgment entered up on an irregular award, for a defect apparent on the face of it (b).

It may be necessary to observe, that cause cannot be shewn against this rule on the last day of the term, but the rule must be made peremptory for the following term; (*R. M.* 36 G. 3, r. 4, *ante*, 883); or to shew cause before a Judge at chambers, in vacation.

If a motion for setting aside an award be made on slight grounds, the rule will be discharged with costs (c).

If a rule to set aside an award has been once obtained and discharged, the Court will not grant another rule on the suggestion of fresh objections (d).

#### SECT. 4.

#### *Enforcing Performance of the Award.*

*Where there is no cause in court.*] Where there is no cause in court, we have seen that the submission to arbitration is by bond, deed, or other written instrument, containing a clause of consent that the submission should be made a rule of court; or by bond, deed, or other written instrument, not containing such clause of assent; or by parol.

In the two latter cases, in which the submission cannot be made a rule of court, the only means of enforcing a performance of the award is by action. If the submission be by bond, the prevailing party may have an action of debt on the bond, which is in general the most preferable remedy (e); if by other deed, he may have covenant (f); if by instrument not under seal, or by parol, he may have assumpsit on the submission; or in any of these cases, if the award be for a sum of money merely, he may have debt on the award (g). Before the 3 & 4 W. 4, c. 42, debt would not in such case lie against an executor or administrator on a submission by his testator or intestate; now, however, by that statute, s. 14, an action of debt is given against the executor and administrator. But before that act, in order to take advantage of the action of debt being brought against an exc-

(b) *Manser v. Heaven*, 3 B. & Adol. 295.

(c) *Snook v. Hellyer*, 2 Chit. Rep. 43.

(d) *Re Hellyer and Snook*, 2 Chit. Rep. 365.

(e) *Ferrer v. Owen*, 7 B. & C. 427, 1 M. & R. 222, S. C.

(f) *Marsh v. Bullock*, 1 D. & R. 106,

VOL. II.

5 B. & Ald. 507, S. C.

(g) See 2 Saund. 62 b, 2 Chit. Pl. 5th ed. 394 notes; 2 Ld. Raym. 1040; *Kingston v. Phelps*, Peake, 227; *Keen v. Butshore*, 1 Esp. 194; *Bailey v. Lechmere*, Id. 377; *Banfill v. Leigh*, 8 T. R. 571; *Antram v. Chace*, 15 East, 209; *Munster v. Rice*, Id. 100.

cutor or administrator, the defendant must have demurred to the declaration (*h*); for if, instead of demurring, he had pleaded this matter to the action, and a verdict had been found against him, he could not take advantage of it afterwards, either in arrest of judgment or by writ of error (*i*). Debt will lie on an agreement to submit with a penalty, for revoking an arbitrator's authority (*k*). Where the parties who had submitted disputes to arbitration by mutual bonds, by indorsements under seal, on the bonds of submission made within the time limited for making the award, agreed that the time should be enlarged to a future day; it was decided that an action of debt on the bond would lie for non-performance of an award made after the original time had expired, but within such enlarged time; for such indorsement operated as a defeazance, or further defeazance to the original bond (*l*). But if the indorsement had not been under seal, no action could have been maintained on the bond for non-performance of the award (*m*). The remedy in the latter case would be in debt, or assumpsit on the award, or assumpsit on the agreement (*n*). It may be necessary to observe, that no objection for matter extrinsic, not appearing upon the face of the award, can be pleaded in these actions, or be given in evidence under the general issue (*o*); the party's only remedy in such a case is by bill in equity. But if the award be bad on the face of it, the defendant may set it out on oyer, and demur.

But where the submission contains the clause of assent above mentioned, the prevailing party has an option of enforcing a performance of the award, either by action as above directed (*p*), or by attachment. (9 & 10 W. 3, c. 15, s. 1) (*q*). But interest accruing due after the making of the award cannot be recovered by attachment, but only by action (*r*). In order to proceed by attachment, *let an affidavit be made of the due execution of the bond or other instrument of submission by the subscribing witness (s); annex the bond, &c. to it, and give it to counsel, with a motion paper, to move to make the submission a rule of court. This is a motion of course, and is absolute in the first instance. Or in vacation, you may obtain a Judge's fiat for a rule, upon production of the above affidavit (t); and take it, together with a motion paper, signed by counsel, to the clerk of the rules, who will draw up the rule. Draw up the rule with the clerk of the rules, and (if costs be awarded) get an appointment on it from the master; serve a copy of the rule and appointment on the opposite at-*

(h) *Hampton v. Boyer*, Cro. El. 557 to 600; 2 Ro. Abr. 107, C. pl. 3.

(i) 10 H. 6, 25 a; *Plowd.* 182 a; *Vaugh.* 97; *Fisher v. Richardson*, Cro. Jac. 47; *Fish v. Richardson*, Yelv. 55; *Palmer v. Lawson*, 1 Sid. 333.

(k) *Warburton v. Storr*, 4 B. & C. 103, 6 D. & R. 113, S. C. \*

(l) *Greig v. Talbot*, 3 D. & R. 446, 2 B. & C. 179, S. C.; *Rex v. Bingham*, 3 Y. & J. 301 to 313.

(m) *Brown v. Goodman*, 3 T. R. 592, n.

(n) *Watson on Awards*, 202.

(o) 1 Saund. 337 a, (n. 3); *Braddick v. Thompson*, 8 East, 344.

(p) See *Stock v. De Smith*, Hardw. 106; *Bradley v. Lovelady*, 1 B. & P. 81.

(q) *Willes*, 202, n; *Baily v. Cheesely*, 1 Salk. 72, 1 Ld. Raym. 674, S. C.; *Hopcraft v. Fernor*, 1 Bingh. 379.

(r) *Churcher v. Stringer*, 2 B. & Adol. 777.

(s) See the form, Chit. Forms, 762.

(t) *Re Taylor*, 5 B. & Ald. 217.

*torney; and, at the time appointed, attend before the master, who will tax the costs, and mark them on the rule (u).*

When you have got the costs taxed, if the party who has to perform the award do not do so within the time thereby limited, (if any be limited), *make a copy of the rule and allocatur (x), and of the award, and power of attorney, (if any), and, after examining the copies with the originals, serve the copies upon the party personally, shewing him at the same time the originals.* The Court will not grant an attachment without personal service, in any case where the party applying has another remedy; and this, although the party purposely avoid the service (y). But in one case, where the party had personal knowledge of the award and rule of court, this Court granted an attachment against him for non-performance of the award, although he had not been personally served (z). *Then let the person, in whose favour the award is made, demand of the other party the money or other thing awarded.* If it be inconvenient for the party himself to make the demand personally, he may depute his attorney or any other person to do it for him (b), by a letter of attorney; a copy of which must be served with the copies of the rule and award, and the original shewn at the same time. Care must be taken to demand the exact sum or thing awarded; if you demand more, and it be refused, you cannot have an attachment for the refusal (c).

If, upon such demand, the opposite party do not pay the money, &c., in compliance with the award, then *let an affidavit be made of the service of the award and rule, and of the demand and refusal (d), and an affidavit of the due execution of the award, and notice thereof, (if necessary), and of the enlargement (e), (if any), and notice thereof, (if necessary); and also of the execution of the letter of attorney, (if any).*

When the submission is made a rule of court under the statute, there being no cause depending, *the affidavit for an attachment need not be intituled (f), or it may be intituled "In the matter, &c." (g).* When the submission to arbitration is by rule of court, or by order of *Nisi Prius*, there being a cause then depending, *the affidavit for an attachment for disobeying the award must be intituled in the cause (h).* Upon these affidavits, *let counsel move for a rule nisi for an attachment for the non-performance of the award. Draw up the*

(u) See the form of rule, Chit. Forms, 761.

(x) *Rer v. Smithies*, 3 T. R. 351; *Reid v. Deer*, 7 D. & R. 612; *Bellairs v. Poultney*, 6 M. & Sel. 230.

(y) *Re Love and another*, 4 B. & Adol. 412; and see *Brandon v. Brandon*, 1 B. & P. 394; *Brander v. Pentreaze*, 5 Taunt. 813; *Read v. Fore*, 1 Chit. Rep. 170.

(z) *Re Bower*, 1 B. & C. 264.

(b) *Laugher v. Laugher*, 1 Dowl. P. C. 284, 1 C. & J. 368, 1 Tyrw. 352, S. C.; *Jackson v. Clarke*, 13 Price, 208, M. & Cl. 72, S. C.; but see *Bass v. Maitland*, 8

Moore, 44.

(c) *Shrutt v. Rogers*, 7 Taunt. 213.

(d) See the form, Chit. Forms, 725.

(e) See *Halden v. Glasscock*, 5 B. & C. 390, 8 D. & R. 151, S. C.; when not necessary, *Dickins v. Jarvis*, 5 B. & C. 528, 8 D. & R. 285, S. C.

(f) *Anon.* 1 Smith, 358; *Bainbrigge v. Houlton*, 5 East, 21.

(g) *Whitehead v. Firth*, 12 East, 166, (a); *In re Houghton*, 2 M. & P. 452.

(h) *Bainbrigge v. Houlton*, 5 East, 21, (a); *Whitehead v. Firth*, 12 East, 166, (a).

rule with the clerk of the rules (i), and serve a copy of it, at the same time shewing the original. Make an affidavit of the service, which must be intituled the same as the rule (k), and give it with a brief to counsel, to move to make the rule absolute. If made absolute, draw up the rule with the clerk of the rules, and take it to the crown office, to one of the clerks in court, who will thereupon make out the attachment; pay him 18s. 6d. Take it to the sheriff's office, and get a warrant on it; give the warrant to your officer who will thereupon arrest the party; pay him one guinea for the caption.

In shewing cause against the rule for the attachment, the other party may impeach the award for any defect appearing upon the face of it, although the time limited for applying to set aside the award may have elapsed (m); but not for matter extrinsic (n). Where it was proposed to shew corruption in the arbitrator as cause against the rule for the attachment, the Court of Common Pleas held, that although that might be a good reason for setting aside the award, it was no answer to an application for an attachment (o). Where the award found a debt to be due, but contained no order to pay it, the Court refused an attachment (p).

The Court will not grant an attachment against a peer (q), or member of the house of commons (r); nor against an administrator or executor, where the submission was made by the intestate or testator (s). Nor on behalf of the administrator or executor of a party who died after the award made, and to whom the money awarded was to be paid (t). And where an arbitrator finds by his award, that, on the balance of accounts the defendant has overpaid the plaintiff a certain sum, the Court will not grant an attachment against the plaintiff for the nonpayment of that sum (u). Nor will the Court grant an attachment, pending a rule for setting aside the award (x); nor pending an action on the same award; nor will they allow the plaintiff to waive the action, in order to apply for the attachment (y). The Court, however, have granted an attachment, pending a foreign attachment in London upon the same award (z); and the party's residing out of the jurisdiction of the Court is no objection to the issuing of an attachment against him (a).

Where the award itself was lost, the Court, upon affidavit of that fact, granted an attachment on a copy of it (b).

Where a party filed a bill in equity to set aside an award, after entering into a rule of this Court to abide by it, the Court held it to

(i) See the form, Chit. Forms, 762.

(k) *Re Houghton*, 2 M. & P. 452.

(m) *Pedley v. Goddard*, 7 T. R. 73.

(n) *Holland v. Brooks*, 6 T. R. 161; *sed quære*.

(o) *Brazier v. Bryant*, 3 Bingh. 167.

(p) *Edgell v. Dallimore*, 3 Bingh. 634.

(q) *Walker v. Earl Grosvenor*, 7 T. R. 171.

(r) *Catmur v. Knatchbull*, 7 T. R. 448.

(s) *Newton v. Walker*, Willes, 315;

(t) *Rex v. Massey*, 1 Dowl. P. C. 538; *semble*, overruling *Rogers v. Stanton*, 7 Taunt. 576.

(u) *Thornton v. Hornby*, 1 Dowl. P. C. 237, 1 M. & Scott, 48, 8 Bingh. 13, S. C.

(x) *Dalling v. Matchett*, Willes, 215.

(y) *Badley v. Loveday*, 1 B. & P. 81.

(z) *Coppell v. Smith*, 4 T. R. 313, n.

(a) *Hopcraft v. Fermor*, 1 Bing. 379.

(b) *Robinson v. Davis*, 1 Str. 526; and see *Hill v. Townsend*, 3 Taunt. 45.

be a contempt, and granted an attachment against him; but they afterwards discharged him without fine, rather than set a small one for so high an offence (c).

*The affidavits in answer to the rule nisi should be intituled, "The King v. ——" (d).*

*Where there is a cause in court.]* If no verdict have been taken, the mode of proceeding is by attachment or action, in the manner above mentioned. But if a verdict were taken, the plaintiff may proceed either by attachment or action, as above directed, or he may enter up judgment upon the verdict and sue out execution; and the defendant (if the award be made in his favour) may proceed by attachment or action.

In order to proceed to judgment on the verdict, *move to make the order of Nisi Prius a rule of court, and draw up the rule as before directed; and the marshal or associate will thereupon give you the Nisi Prius record. Enter the postea on it for the amount of the sum awarded (e); get it marked by the clerk of the postea; give the usual one day's notice of taxation of costs; then take the postea, together with the rule and award, and the papers in the cause, to the master, who will thereupon tax the costs and sign judgment.* It is not necessary that the defendant in this case should be served with a copy of the award; nor is it necessary to obtain leave of the Court to sign judgment (f), unless it be required to enter up the judgment as of the term next after the finding of the verdict, where the award was not made until the term after that term (g). Where the award was lost, the Court, upon an affidavit stating that fact, and stating the substance of the award, allowed the plaintiff to sign his judgment (h).

After signing judgment, you may sue out execution, as in ordinary cases. If the award state any particular time at which the money is to be paid, execution should not be sued out, nor indeed in strictness, perhaps, should judgment be signed, before that time have elapsed (i).

(c) *Rex v. Wheeler*, 3 Bur. 1256, 1 W. Bl. 311, S. C.; and see *Davila v. Almanza*, 1 Salk. 73.

(d) *Bevan v. Bevan*, 3 T. R. 601; *Bainbrigge v. Houlton*, 5 East, 21 n.

(e) *Lee v. Lingard*, 1 East, 401; *Grimes v. Naish*, 1 B. & P. 480; *Borroddale v. Hitchener*, 3 Id. 244; *Hayward v. Ribbons*, 4 East, 310; *Bonner*

*v. Charlton*, 5 East, 139, 143, 144; *Prentice v. Reed*, 1 Taunt. 151; and see *Grundy v. Wilson*, 7 Id. 700.

(f) *Lee v. Lingard*, 1 East, 401; *Grimes v. Naish*, 1 B. & P. 480; *Borroddale v. Hitchener*, 3 Id. 244.

(g) *Brook v. Feurns*, 1 Dowl. P. C. 144.

(h) *Hill v. Townsend*, 3 Taunt. 45.

(i) *Callard v. Paterson*, 4 Taunt. 319.

## PART III.

## ATTACHMENT.

*In what cases.*] IF a person, upon being served with the process of the Court, use contemptuous expressions of such process or of the Court itself; the Court, upon affidavit of the fact, will grant an attachment against him (a): if of the Court, the rule is granted absolute in the first instance; if of the process, it is a rule *nisi* only (b).

If the sheriff return a rescue, the Court will grant an attachment against the rescuers, absolute in the first instance (c); for the sheriff's return in this case being in the nature of a conviction, and not traversable, (the only remedy for the party, if he be not guilty, being by action against the sheriff for his false return) (d), it would be useless to grant a rule *nisi* (e).

The Court have a power of punishing attorneys and other officers of this court, by attachment, for misbehaviour in the exercise of their profession. Thus, if an attorney sue or defend an action, without authority, particularly if he do so from any improper motive; or if a person, who is not an attorney, sue or defend an action for another, with or without authority: the Court will punish him by attachment (f). So, if a person put an attorney's name to process, without his authority, the Court will grant an attachment against him, and will also set aside the proceedings, (*Vol. 1, 26*) (g); or if an attorney allow an unqualified person to act in his name, or shall in any manner act as agent for such person, the Court, upon application and affidavit of the facts, may order the attorney to be struck off the roll, and may commit such unqualified person to the prison of the Court, for any time not exceeding one year. (22 *G. 2, c. 46, s. 11, Vol. 1, 26*). Also, where an attorney and his articulated clerk joined in the affidavit of execution of the articles, and the clerk swore to the service under them, and was consequently admitted an attorney; but it appearing afterwards that the articles were merely collusive, the pretended clerk being in fact an apprentice to a hatter, and his affidavit of service under the articles false, the Court ordered the clerk to be struck off the roll, and granted an attachment against the attorney for the collusion (h). If an attorney refuse to deliver up to his client

(a) 2 Hawk. c. 22, s. 36.

(b) 2 Hawk. c. 22, s. 36; *Rex v. Jones*, 1 Str. 185; *Anon.* 1 Salk. 84; R. T. 17 G. 3.

(c) *Anon.* Say. 121; *Rex v. Elkins*, 4 Bur. 2129; *Sheather v. Holt*, 1 Str. 531.

(d) *Rex v. Pember*, Hardw. 112.

(e) See 2 Hawk. c. 22, s. 34.

(f) 2 Hawk. c. 22, ss. 6 to 9.

(g) *Oppenheim v. Harrison*, 1 Bur. 20. See *Hopwood v. Adams*, 5 Bur. 2660.

(h) *Ex p. Hill*, 2 W. Bl. 991.

writings or money received by him in the course of his professional business, the Court may punish him by attachment; but they seldom grant an attachment in such a case, without first making a rule upon the attorney to deliver up the writings, &c., and if that rule be not obeyed, the attachment then issues for the contempt (*i*). So, if an attorney be guilty of fraud or malpractice in his profession, the Court will punish him by attachment. (*See Vol. 1, 40*) (*k*).

If the sheriff do not obey the rule to return the writ or bring in the body, the Court will grant an attachment against him, absolute in the first instance. (*Vol. 1, 134, 137*). So, in other cases, for not executing writs, or for executing them in an oppressive manner, or for not executing them effectually, &c., the Court will punish the sheriff or his officers by attachment. (*Vol. 1, 348*) (*l*). So, where an attachment against the sheriff was directed to the coroner, and the latter was ruled to bring in the body, the Court granted an attachment against him, absolute in the first instance, for not obeying the rule (*m*). The sheriff, however, is not liable to an attachment for not taking a bond in replevin; but the defendant, if damnified, may have his remedy against him by action. (*Ante, 597*) (*n*). As to the cases in which the Court will punish the judges of inferior courts, justices of peace, gaolers, &c. by attachment, see *2 Hawk. c. 22, ss. 25 to 32; Rex v. Justices of Seaford, 1 W. Bl. 432*.

If any person wilfully disobey the process of the Court, he is punishable by attachment. Thus, if a witness, regularly served with a *subpœna*, do not attend at the trial, the Court, upon an affidavit stating a personal service of the *subpœna* ticket a reasonable time before the trial, and payment or tender of his reasonable expenses to the witness, will grant an attachment against him. (*Vol. 1, 248*) (*p*). The motion in such a case must be made as soon as possible, and at all events in the term succeeding the trial (*q*).

For disobedience of any rule of Court, or of any Judge's order or order of *Nisi Prius* made a rule of Court, the party guilty of it is punishable by attachment, if the rule or a copy of it have been personally served upon him, the rule itself at the same time shewn to him (*r*), a demand personally made upon him to comply with the rule (*s*), and a neglect or refusal to do so (*t*). Thus, the nonperformance of an award, if made under a rule of Court, or if the submission, order of *Nisi Prius*, or Judge's order, be made a rule of Court, is punishable by attachment. (*Ante, 926, 927*). And if the rule require the party to do a thing forthwith, as for instance, to reinstate certain

(i) *2 Hawk. c. 22, s. 10*.

(k) *Id. ss. 10, 11*.

(l) *2 Hawk. c. 22, ss. 2 to 5. See Chapman v. Maddison, 2 Str. 1089*.

(m) *Andrews v. Sharp, 2 W. Bl. 911; Rex v. Peckham, Id. 1218*.

(n) *Rex v. Lewis, 2 T. R. 617*.

(p) *Thorpe v. Graham, 11 Moore, 55, 3 Bingh. 223, S. C.; 2 Hawk. c. 22, s. 34*.

(q) *Thorpe v. Graham, 3 Bingh. 223, 11 Moore, 55, S. C.*

(r) *Rex v. Smithies, 3 T. R. 351; Barnard v. Berger, 1 New Rep. 121; Baker v. Rue, 1 Dowl. P. C. 689; Re Lowe, 4 B. & Adol. 412; ante, 927*.

(s) *Dodington v. Hudson, 1 Bingh. 410*.

(t) *2 Hawk. c. 22, s. 37. See Davies v. Povey v. Roe, 2 W. Bl. 892; Camden v. Edie, 1 H. Bl. 21, 49; Cooke v. Tanswell, 8 Taunt. 131; Bodington v. Harris, 1 Bingh. 187; North v. Evans, 2 H. Bl. 35*.



premises, the Court, upon application, will grant an attachment, if the party do not presently begin the work, although the work be of such a nature that it may take some time to complete it (u).

Where a person is ordered by a rule of Court absolutely to pay costs, and a copy of the rule, with the master's *allocatur* thereon, is personally served on him, and the rule itself at the same time shewn to him; and a demand made of the costs by the person to whom they are payable according to the terms of the rule, or by some person deputed by him by letter of attorney, (*see ante*, 927); if he do not pay the costs, when thus demanded, the Court will grant an attachment against him absolute in the first instance. (*R. T. 17 G. 3*) (x); unless they be costs taxed between attorney and client, pursuant to the master's *allocatur*, in which case the rule for the attachment will be a rule *nisi* only in the first instance (y). Where the plaintiff's attorney demanded the costs, without a letter of attorney authorizing him to do so, it was deemed sufficient; for the attorney was in fact entitled to the costs when received (z). Although a party is at one time in contempt for not paying costs which have been duly demanded, yet, if before an attachment is moved for the sum due becomes reduced in amount, a fresh demand of the reduced sum must be made to ground a motion for an attachment (a). Where a plaintiff obtains a rule to discontinue, upon payment of costs, he is not punishable by attachment if he do not pay them. (*Ante*, 794) (b). So, if the defendant obtain a rule or order to stay proceedings upon payment of debt and costs, he cannot in general be punished by attachment, if he do not afterwards pay the debt and costs; but the plaintiff should proceed in his action. (*Ante*, 750). So, formerly, if a defendant paid money into Court, and did not afterwards pay the costs, no attachment would be granted against him for the nonpayment of them, but the plaintiff's only course in such a case was to proceed in the action; but now an attachment may be granted. (*See ante*, 743). Upon obtaining leave to compound a penal action, the rule must express that the defendant doth thereby undertake to pay the sum for which he has leave to compound the action; (*R. E. 33 G. 2, r. 2*); and if he do not afterwards pay it, the Court upon application will award an attachment against him (c).

If any person abuse the process of the Court, he is punishable for it by attachment. As where execution was sued out without a judgment to warrant it (d); where a woman brought an appeal of the death of her husband, knowing at the same time that her husband was alive (e); where a *latitat* was sued out, merely for the purpose of bringing a defendant within the jurisdiction of an inferior court, in order to sue him there (f); where the plaintiff, after bringing an action

(u) *Dodington v. Hudson*, 1 Bingham 464.

(x) *See Rex v. Stokes*, Cowp. 136; *Rex v. Ireland*, 3 T. R. 512.

(y) *Bray v. Yates*, 1 Dowl. P. C. 459.

(z) *Per Holroyd, J.*, MS. T. 1820.

(a) *Spivy v. Webster*, 1 Dowl. P. C. 696.

(b) *Stokes v. Woodeson*, 7 T. R. 6; and see *Rex v. Fenin*, 2 Dowl. P. C. 182.

(c) *Rex v. Clifton*, 5 T. R. 257.

(d) *Waterhouse v. Saltmarsh*, Hobart 264; *Fortescue*, 267.

(e) 8 H. 4, 7; 2 Hawk. c. 22, s. 39.

(f) 2 Hawk. c. 22, s. 40.

in one court commenced an action in another, for the same debt, and against the same defendant (*g*); or where a person sued out bailable process and thereupon arrested a witness, for the purpose of preventing him from giving evidence before an arbitrator (*h*); or the like. So, if a person forge the process of the Court, or alter or fill it up after it has been sealed; or if he obtain judgment in ejectment, by an affidavit of service of the declaration on one who was procured to personate the tenant; in these and the like cases the Court will punish the person so offending by attachment (*i*). The Court have also granted an attachment against a person for sending inflammatory papers to the jurors summoned upon a certain trial, and for preventing some of them from attending by sending them notice that the trial was put off (*j*). And, in another case, they granted an attachment against a man for threatening a prosecutor with danger of his life, because he had prosecuted another for some offence (*k*).

As to contempts committed in the face of the Court, there is of course no necessity for an attachment, that being merely a process to bring the defendant before the Court; but he may be instantly apprehended and imprisoned at the discretion of the Judges, without any other proof or examination. See as to the punishment of jurors for misconduct, *2 Hawk. c. 22, ss. 14 to 24.*

If a client, when his business in Court is dispatched, refuse to pay the officer the fees that are due to him for doing business, the Court on motion will grant an attachment against him to have him committed until he pay the fees; for, not paying the fees is a contempt of Court, and the Court is bound to protect its officers in their rights (*m*).

It may be necessary to add, that the Court will not grant an attachment against peers or members of parliament for the nonperformance of an award, nonpayment of costs, or the like (*n*); but for very gross contempts, such as rescous, disobedience of the king's writs, or the like, they will (*o*). The Court will not grant an attachment against an executor of the lessor in ejectment for costs (*p*); such lessor having died after entering into the consent rule.

*The attachment.]* The application for an attachment must be founded on an affidavit of the facts necessary to constitute the contempt; (*see as to the title of affidavits, in cases of attachment generally, ante, 900*); excepting in the case of a rescue, where the sheriff's return of the rescue is deemed sufficient, although he returns that the rescue was from his bailiff (*q*). The Court will thereupon grant either a rule for the attachment absolute in the first instance, or a rule to shew cause why the attachment should not issue: for nonpay-

(*g*) 14 H. 7, s. 6; 6 Co. 60; Say. 14; 2 Hawk. c. 22, s. 41; and see *Id.* s. 42.

(*h*) *Rex v. Hall*, 2 W. Bl. 1110.

(*i*) 2 Hawk. c. 22, s. 43.

(*j*) *Rex v. Lucas*, 3 Bur. 1564.

(*k*) *Rex v. Carroll*, 1 Wils. 75.

(*m*) 1 Lil. Prac. Reg. 590; Tidd's Supp. 51.

(*n*) *Walker v. Earl Grosvenor*, 7 T. R. 171; *Catmur v. Knatchbull*, *Id.* 448, *ante*, 923.

(*o*) 2 Hawk. c. 22, s. 33; *Rex v. Earl Ferrers*, 1 Bur. 634; *Foley v. Langhorne*, Say. 50.

(*p*) 1 B. & C. 284, *ante*, 928.

(*q*) *Gobby v. Dewes*, 10 Bing. 112.

ment of costs on the master's *allocatur*, or against the sheriff for not obeying the rule to return the writ or bring in the body, or for a contempt of the Court in the execution of process of the Court, the rule is absolute in the first instance; (*R. T. 17 G. 3*); in all other cases, it is a rule *nisi* only. If a rule *nisi* merely, it cannot be moved for on the last day of term (*r*); but if absolute in the first instance, it may. (*See Vol. 1, 60*) (*s*).

If the rule be granted, draw it up with the clerk of the rules; and (if a rule *nisi*) serve a copy of it personally on the defendant, at the same time shewing him the original rule. Where it appeared from circumstances that the defendant kept out of the way, for the purpose of avoiding a personal service of the rule, the Court, in two instances, upon an affidavit of these circumstances, ordered that leaving it for him at his last and most usual place of abode should be deemed good service (*t*); but, in other cases, the Court have ruled otherwise (*u*); and the rule as now understood, and more especially since the late rule of all the Courts of *H. T. 2 W. 4*, seems to be, that a personal service will not be dispensed with, (*see R. II. 2 W. 4, r. 51*) (*w*), unless indeed it appears that the rule has been seen in the actual personal possession of the party who should have been served with it (*x*), or under some very strong facts. Make an affidavit of service (*y*), and give it with a brief to counsel, to move to make the rule absolute. It will be no answer to this rule, for the party to say that he was not personally served with the rule *nisi* or the original rule; if the affidavit of the party applying for the attachment state a personal service, that will be deemed conclusive of the fact (*z*). So, although the party, in shewing cause, deny by his affidavit what is imputed to him, yet if what he states be incredible, the Court will make the rule absolute (*a*). The Court will not in general allow cause to be shewn at chambers (*b*). If the rule be made absolute, draw it up with the clerk of the rules; take the rule to one of the clerks in court, at the crown office, who will thereupon make out the attachment; pay 18s. 6d.

The attachment, although a judicial writ, must be returnable on a general return day, and not on a day certain (*c*). Indorse on it the name and address of the attorney, and also (by *R. II. 2 & 3 G. 4*), the place of abode and addition of the party against whom the writ is issued, or such other description of him as such attorney may be able to give. Take the attachment to the sheriff's office, if it be directed to him, and obtain a warrant on it; give the warrant to your officer, who will thereupon arrest the defendant; pay him one guinea for the caption. The sheriff is not, it seems, entitled to poundage (*d*). It may be necessary

(*r*) *Anon.* 3 Smith, 118.

(*s*) 12 East, 591.

(*t*) *MS. M. 1814*, and *Green v. Prosser*, 2 Dowl. P. C. 99.

(*u*) *Re v. Carpenter*, *MS. H. 1825*; *Anon.* 1 Chit. Rep. 99; and see *M'Alleham v. Smith*, 8 T. R. 86.

(*w*) *Anon.* 1 D. & R. 529.

(*x*) *In the matter of Bower*, 1 B. & C.

264.

(*y*) See form, Chit. Forms, 417.

(*z*) *Hopley v. Granger*, 1 N. R. 256.

(*a*) *In the matter of Crossley*, 6 T. R. 701.

(*b*) *Fall v. Fall*, 2 Dowl. P. C. 88.

(*c*) *Re v. Wilkins*, 1 Str. 624.

(*d*) *Re v. Palmer*, 2 East, 411.

to mention that the defendant cannot be arrested on a Sunday (*d*); nor can even the rule *nisi* be served on a Sunday (*e*).

If the sheriff or other officer to whom this writ is directed, do not return it when necessary, you may rule him to do so. If he return *non est inventus*, you may sue out an *alias* in the manner above directed; and if he return *non est inventus* to the *alias*, then get a certificate to that effect from your clerk in court, and take it to a Judge's chambers and obtain a warrant thereon, upon which the party may be arrested in any county..

When the defendant is arrested upon this writ or warrant, he is brought into court or before a Judge at chambers, and sworn to answer interrogatories; he is then committed, unless, with the leave of the Court or Judge, he enter into a recognizance, with sureties, for his appearance in court from day to day, to answer interrogatories concerning such matters as may be objected against him. Or the defendant may appear voluntarily, and be sworn and enter into the recognizance, as above mentioned. Serve a notice on the opposite attorney that the defendant will appear in court, or before a Judge at chambers, on a certain day, in order to enter into a recognizance, and be sworn to answer all such interrogatories as shall be exhibited against him, stating the names and additions of the bail, as in ordinary cases (*f*). This notice should be given 24 hours at least previously to the defendant's being brought up, if the bail reside in town; or two days or more, if they reside elsewhere, according to the distance. Then get a rule from the clerk of the rules on the crown side, to bring up the defendant, if he be in the custody of the marshal; but if in the custody of the sheriff, it seems a writ of *habeas corpus* will be necessary (*g*). When brought up, the bail justify, and the recognizance is taken, as in ordinary cases. It is entirely discretionary with the Court or Judge whether they will allow the defendant to be bailed or not; and in very gross cases, or where the defendant appears evidently guilty, they usually refuse it (*h*).

*Interrogatories, &c.*] Upon the defendant's being bailed or committed, the Court, upon application, will grant a rule, that unless the prosecutor exhibit interrogatories against him in the crown office, within four days, the defendant shall be discharged. Draw up the rule with the clerk of the rules on the crown side, and serve a copy of it on the prosecutor or his attorney; and if the interrogatories be not exhibited within the time limited by the rule, the defendant may move to be discharged out of custody, or (if he be out on bail) that his recognizance be discharged. The prosecutor, however, may exhibit his interrogatories at any time before the motion is actually made (*i*).

These interrogatories must be exhibited in all cases, excepting the

(*d*) *Rex v. Myers*, 1 T. R. 265, 266;  
but see *Anon. Willes*, 459; *Exp. Whit-*  
*church*, 1 Atk. 55.

(*e*) *M'Ilham v. Smith*, 8 T. R. 96.

(*f*) See *Anon.* 4 D. & R. 393.

(*g*) *Imp. C. B.* 570.

(*h*) 2 Hawk. c. 22, s. 1.

(*i*) *Id.*

case of an attachment for nonpayment of money, which is in the nature of a civil execution (*j*); but in all other cases the interrogatories alone contain the charge against the defendant, the attachment being but process to bring him in to answer to the charge when exhibited. Therefore, the defendant cannot come in and confess the contempt, before the interrogatories are filed; for until they are filed there is no charge in court against him to which he can plead (*k*). The case of an attachment for a rescue, indeed, depends upon different grounds; for there the sheriff's return of the rescue is in itself a conviction, and not traversable (*l*). Yet, even in that case, it is the invariable practice of the Court to put the defendant to answer interrogatories, unless the prosecutor consent to his confessing the contempt without them (*m*).

*Engross these interrogatories on parchment, and get them signed by counsel; (R. M. 34 G. 3) (n). File them with the examiner, who will make out a copy on paper for the defendant. If the defendant be in custody of the marshal, get a rule from the clerk of the rules on the crown side to have him brought up before the examiner to be examined; get an appointment on it from the examiner; and serve copies of the rule and appointment on the marshal and on the defendant. If in custody of the sheriff, the defendant, I think, must be brought up by habeas corpus. If out on bail, however, it is merely necessary to get an appointment from the examiner, and serve a notice of it upon the defendant or his attorney; or if the defendant desire the examination, he may get the appointment, and attend to be examined at the time so appointed. The examiner thereupon examines the defendant upon the interrogatories; and will afterwards make out copies of the examination for the parties upon paper; pay him 7d. per sheet. If the defendant, upon being brought up, refuse to answer to the interrogatories, he shall be recommitted; or if out on bail, and he do not attend to be examined, his recognizance may be estreated, or the Court may again attach him for this second contempt, and punish him at their discretion.*

When he has been examined, the prosecutor then moves that the examination, &c. be referred to the master; which is a motion of course. *Draw up the rule with the clerk of the rules on the crown side; get an appointment upon it from the master, and serve a copy of the rule and appointment on the opposite attorney. Let each attorney then attend before the master, together with their clerks in court, and counsel, if thought necessary, and the master will hear the statements and arguments on both sides. After which, when you learn that the master is ready, move the Court for his report; a notice of which motion should be given to the defendant, as he must attend personally in court at the time the master makes his report. It may be necessary to observe that this motion cannot be made on the last day of term,*

(j) See *Bonafous v. Schoole*, 4 T. R. 316.

(k) *Rex v. Edwards*, 4 Bur. 2105, 1 W. Bl. 637, S. C.

(l) *Rex v. Elkins* 4 Bur. 2129, 1 W. Bl. 640, S. C.

(m) *Rex v. Horsley*, 5 T. R. 362.

(n) See the form, 10 Went. 404

without the permission of the Court, or under very special circumstances (o). If the defendant have cleared himself of his contempt in his answer, the master will report accordingly (p), and the Court will thereupon order him to be discharged out of custody, or, if he be out on bail, will order his recognizance to be discharged; but he is still liable to an indictment for perjury, if his answer be false (q). But if sufficient be confessed by the answer to prove him guilty of the contempt, the master accordingly reports him in contempt, and the Court give judgment of fine, or imprisonment, or both, and sometimes of corporal punishment (r), at their discretion, in the same manner as upon a conviction for a misdemeanor at common law. The Court, however, if they think fit, may waive the giving of judgment, and order the recognizance to be discharged (s); or the attorney-general may consent that the defendant continue at large, upon his recognizance to appear, under a rule of court, at some future time (t). If judgment be not given during the same term, the cause will be set down in the peremptory paper with those motions appointed to come on peremptorily in the ensuing term. (*R. H.* 34 G. 3).

If the defendant clear himself of his contempt, and be discharged, he is not in strictness entitled to costs; yet if it clearly appear to the Court that the prosecutor must have known his complaint to be ill-founded and vexatious, they will order him to pay costs to the defendant (u).

As the business on the crown side of this Court is conducted by the clerks in court, the attornies on either side have little to do in the proceedings upon an attachment; but each employs a clerk in court, who conducts the proceedings for him.

In the case of an attachment for the nonpayment of money or nonperformance of an award, or the like, the attachment being in the nature of a civil execution (x), interrogatories are never filed, but the party is detained in custody until he pays the money or performs the award. Yet in cases where the rule for the attachment is absolute in the first instance, if the defendant wish to dispute the fact of the contempt, he may rule his adversary to exhibit interrogatories as above-mentioned.

As to the proceedings upon an attachment against the sheriff, see *Vol.* 1, 137.

(o) *Rex v. Wheeler*, 1 W. Bl. 311, 3 Bur. 1256, S. C.

(p) See *In the matter of Isaacson*, 1 Bingham. 272.

(q) *Saunders v. Melhuish*, 6 Mod. 73. See 2 Hawk. c. 22, s. 1; *Rex v. Wheeler*, 3 Bur. 1257.

(r) *Royson's case*, Cro. Car. 146; *Rex*

*v. Vaughan*, 1 Wils. 22.

(s) *Rex v. Wheeler*, 3 Bur. 1256, 1 W. Bl. 311, S. C.

(t) *Rex v. Beardmore*, 2 Bur. 797.

(u) *Rex v. Plunket*, 3 Bur. 1329.

(x) See *Bonafous v. Schoole*, 4 T. R. 316.



## INDEX.

### A.

- ABANDONING** pleadings, 210, 213; abandoning judgment, 507; abandoning costs, 319; abandoned possession of premises, what is, 556. *See* "*Waiver*."
- Abatement of suit**, how far death is, *see* "*Death*."
- Abatement**, plea in, for non-joinder of defendant, proceedings on, 469, *see* "*Non-joinder*;" for misnomer, not allowed, &c. 470; not allowed in ejectment, 470; time for pleading in, 470; when further time granted, 470; inspection refused, to allow plea of non-joinder, 769; appearing and putting in, &c. bail on, 471; taking declaration out of office, 471; when to be pleaded in person of by attorney, 471; not amendable, 471; affidavit on, 471; how and when to be framed, &c., 471, 472; practical directions as to the pleading, 472; not an issuable plea, 200; replication, demurrer, &c. to, 472, 475; quashing plea, 472; *cassetur breve*, 472; issue on, 473; trial on, who to begin, 276; judgment on, what, and form of, &c., 473; costs on, 473; subsequent proceedings after judgment of respondent *ouster*, &c., 473.
- Abatement of writ of error**, 333.
- Abbreviations in attorney's bill**, what allowed, 47.
- Abiding by plea**, rule for, unnecessary, 211.
- Abode**, *see* "*Residence*."
- Abroad**, *see* "*Residence*," "*Foreign Country*."
- Absconding of tenant**, service of declaration in ejectment in case of, 533, 535.
- Absence of witness**, &c., new trial for, 820; of counsel or attorney, &c. 821.
- Absolute rules**, 881, 885. *See* "*Rules and Motions*."
- Absolutely**, declaring so, 184, 185.
- Accedas ad curiam**, 581; proceedings on, &c. 581, 582.
- Accepting of bail**, 157, 159; of issue, 220.
- Account**, jurisdiction of the Court in actions of, 2.
- Account books**, proof by entries, &c. in, 243.
- Account stated**, affidavit of debt on, 84, 86.



- Ac etiam** clause in bailable process, now abolished, 103.
- Acknowledgment** of marshal that prisoner is in his custody, 643; of service of declaration in ejectment, 532, 535.
- Act of parliament**, *see* "*Statutes.*"
- Act of state**, proof of, 238.
- Actio personalis moritur cum persona**, 876.
- Action**, in what actions defendant may be held to bail, 78—82; statement of cause of, in affidavit of debt, 84—90; statement of, in writ, 103, 444.
- against sheriff for arresting privileged person, 66, 69, 409; for arresting in case of a misnomer, 101, 409; for escape, 127, 128, *see* "*Escape*;" for false return, 134; for not assigning bond, 139.
  - on bail bond, by plaintiff, 140; by sheriff, 142.
  - on bill or note, evidence in, 242.
  - against witness, for not obeying subpoena, 248.
  - of ejectment, 528. *See* "*Ejectment.*"
  - of replevin, 573. *See* "*Replevin.*"
  - for mesne profits, 571. *See* "*Mesne Profits.*"
  - scire facias, when an action, 598.
  - by and against attornies and officers, 629, 831. *See* "*Attornies.*"
  - by or against bankrupt or assignees, 682, 685. *See* "*Bankrupts.*"
  - by or against baron and feme, 678. *See* "*Husband and Wife.*"
  - against clergymen, 695. *See* "*Clergymen.*"
  - by or against corporations, 620. *See* "*Corporations.*"
  - against a devisee, 672. *See* "*Devisee.*"
  - by or against executor, &c., 661, 662. *See* "*Executors.*"
  - against heir, 669. *See* "*Heirs.*"
  - against hundredors, 621. *See* "*Hundredors.*"
  - by or against idiot or lunatic, 690. *See* "*Lunatic.*"
  - by or against infant, 673, 675. *See* "*Infant.*"
  - against justices, constables, &c., 691. *See* "*Justices of Peace.*"
  - against marshal for escape, 633.
  - against officer of excise or customs, 691. *See* "*Customs.*"
  - by pauper, 697. *See* "*Pauper.*"
  - against peer or member of parliament, 617. *See* "*Members of Parliament.*"
  - by and against prisoners, 635. *See* "*Prisoner.*"
- Adding bail**, 161; not allowed without leave, 161; practical directions as to, 161; not necessary to except to, 158, 162; exoneration of former bail, 162.
- pleas, 211.
- Addition of parties** in writ of *capias*, 103; in writ of summons, 444; indorsement of, on *capias*, 108.
- of bail in bail piece, 154.
  - of deponent in affidavit, 83, 931.
- Additions**, on plea of, plaintiff may sign judgment, 201.

Adjournment day, notice of trial for, &c., 224; adjournment of execution of inquiry by sheriff, 517.

Administration, how proved, 235. See "*Executor*."

Administrators, see "*Executor*."

Admiralty, proceedings in, how proved, 235.

Admission of an attorney, 22; his admission in other courts, 17.

—— of guardian, &c. to prosecute, &c., for infants, 674, 676.

—— to sue in forma pauperis, 697.

—— notice to admit a record, &c., 228; summons to admit written instrument stated in pleadings, 238.

—— into prison, right of public to, &c. 648.

Adverse claims, 756. See "*Interpleader*."

Advowson, extending of, 405.

Affidavit, generally.

General rule as to form of, 899; clerical errors in, disregarded, 899; title of, 899; in what court, 899, 900; in what cause, &c., 899, 900; place of abode and addition of the deponent, 901; what a sufficient description, 901; addition, &c. of other parties not in general requisite, 902; but names of third persons should be stated, 902; the jurat, 902; form of, 902; time of swearing must be stated in, 902; jurat, where affidavit by an illiterate person or marksman, 902; when sworn by foreigner, &c., 902; statement of place where sworn, 903; erasure, &c. in, not allowed, 91, 908; how long affidavit in force, 903, 93; defects in, when aided, 903; by appearance of defendant, 94; supplementary affidavits, when allowed, 94, 903, 535; additional affidavit after obtaining rule nisi, 882, 884, 903; before whom to be sworn, 903, 11; before the court, or a Judge, or commissioner, 903; in Ireland or Scotland, 904; before British consul, 905; when affidavit to be filed, 905; filing affidavit of debt, 82; filing affidavit on motion, 882, 884; filing it in other cases, 905; how proved, 234.

—— of execution of articles of clerkship, 17; of service under, 20; of stamp duty being paid, and of enrolment, 21.

—— to obtain rule nisi, 882, 884.

—— to shew cause against rule nisi, 884.

—— to obtain distringas, 458.

—— to enter appearance for defendant, 453, 460.

—— to hold to bail, 82; how intitled, 82; deponent's addition, 83; names of parties, 83; cause of action, 84—90; must be positive as to debt, 84; swearing to belief, &c., 84; where impossible to swear positively, 84; must shew a sufficient cause of action, 85; must be explicit, 85; several instances, 85—90, (*see the different titles*); must be so stated that perjury might be assigned, 90; must not be double, 90; must agree with declaration and writ, 90; negative of tender, 90. Jurat, 91; consequence of erasure, &c., in, 91; by whom to be sworn, 92; before whom to be sworn, 92; when to be sworn, and duration of, 93.

- Affidavit by an executor or administrator, 84; by assignee of a bankrupt, 85; by assignee of a bond, 85. Affidavit made in Ireland, Scotland, &c. 91, 92. Consequences of defect in affidavit, 93; bad in part, bad for whole, 94; when defects in, waived, 94. Counter affidavit, 94. Supplementary affidavit, 95; must be filed, 82, 94, 109.
- Affidavit for attachment against sheriff for not returning writ, 134; for not bringing in body, 137.
- of merits, 147, 507.
  - of sufficiency accompanying notice of bail, 156, 157.
  - to oppose bail, 166.
  - of extra costs, 318, 319.
  - to falsify sham plea, 204.
  - to obtain judge's certificate for immediate execution, 286 *a*.
  - to enter up judgment on old warrant of attorney, 498, 499.
  - to set aside regular judgment by default, 507.
  - of service of declaration in ejectment, 534.
  - to verify a plea in abatement, or dilatory plea, 471; judgment for want of, 204, 472.
  - to verify plea puis darrein continuance, 288.
  - , on writ of error, of truth of error in fact, 368.
  - to change venue, 726.
  - to obtain judgment as in case of a nonsuit, &c., 807.
  - to obtain a new trial, 824, 825.
  - to compel attendance of witness before arbitrator, 913.
  - to set aside, &c., award, 924.
  - to obtain attachment, &c., for nonperformance of award, 926, 927.
- Agent, affidavit of debt by, 84.
- to attorney, 27, 28, *see* "*Attornies*;" notices, &c. to, 27, 225; attorney bound by acts of, &c., 27; payment of debt, &c. to, 28; lien of, 28; when attorney liable to, for bill, 28; attorney acting as agent for unqualified person, 26, 27; indorsement on process, as to, 29; taxation of bill of, 48, 49; need not deliver signed bill, 46; their lien for their charges, 27, 53; mistake of, in not taking out certificate, 32.
- Agreement by attorney, 35, 39; between attorney and client, not to restrain taxation of bill, 50; affidavit of debt on, 86; inspection of, 769; order to produce, to get stamped, &c., 771; not to bring error, 328, 332, 340; not to issue execution, 374; terms of, should be expressed on cognovit, 487; on warrant of attorney, 492; when scire fa. to revive judgment not necessary after, 600.\*
- Alias capias, 109; summons, 451; fi. fa., 400; elegit, 406, 413; attachment, 935.
- Aliens, when cannot be holden to bail, 67; when bail of, to sheriff, discharged, 146. Plea of alien enemy not issuable, 200; not allowed to be pleaded with another plea, 208; when may be

- jurors, 290, 292; when cannot be arrested on ca. sa., 409; time to render principal when an alien, 420.
- Alleging diminution*, 347, 349.
- Allocatur*, evidence by, 52; arrest on, not allowed, 79; action on, does not lie, 80; attachment for not paying costs on, 932, &c.
- Allocatur exigent*, 704, 705.
- Allowance of bail*, rule of, 173; setting aside, 174, 175; bail cannot apply to court until allowance, 174.
- of writ of error, 336—341, 358; return of, 400.
- Allowances to prisoners*, 647, 648.
- Almanack*, proof of, 238.
- Alteration of warrant of attorney after execution*, 496; of process, &c. of Court, attachment for, 933.
- Ambassadors and servants* cannot be arrested, 66, 67, 409; consequences of arrest, 67, 409; security for costs in action by, 762.
- Amendment generally*.
- Before judgment, 831; after judgment, and before error brought, 831; application for, in what Court to be made, 831; terms usually imposed on amendments, 832.
- What amendable at common law*, 832; whilst proceedings are in paper, 832; after demurrer, 832, 479; after error brought, 833.
- What amendable by statute*, 833; process, for misprision of clerks, &c., 833; record, &c., 833; meaning of the term clerk, 834.
- What aided at common law*, 834; after issue joined, 834; by pleadings, &c., 834.
- What aided by statutes of jeofails*, 834; in what cases, 834; in what actions, 834; when no actual amendment necessary, 835.
- Amendment in particular cases*.
- Warrant of attorney*, 835; want of, 835; mistake, &c. in, 835; by infant under age, 835.
- Original writ or bill*, 835; *plaints in inferior Courts*, 836.
- Process, mesne*, 836; for misprision of clerks, 836; in what cases amendable, 836, 837, 111, 104, 452; if writ void, no amendment allowed, 837; in bailable cases, 837, 104, 111; of copy of writ, not allowed, 837; what a waiver of mistake in process, 837; after verdict, what aided, 837; defect in, no ground for writ of error, 837.
- Affidavit*, &c., of jurat in affidavit, in country bail, 178; supplemental affidavit, when allowed, 95, 903, 535.
- Appearance*, 837; in wrong name, 837; bail piece, 837; recognition of bail, 838; when defect in appearance waived, 783.
- Declaration*, 838; in what particulars, 838; in title, 838; in venue, 838, 731; in parties' names, 838; in body of declaration, 838; in particular actions, 838; in form of action, 838; after two terms, 838; in the damages, 838, 839; in

ejection, 535; before plea, 839; after plea, 839; costs on, 839; defect in misprision of clerks, 839; what aided at common law, 839, 834; what aided by verdict or statutes of jeofails, 840; time for pleading after amendment, 196; new rule to plead, 196; demand of plea, 196; the new plea, 196.

*Particulars of demand*, 776, 841.

*Plea, Replication, &c.*, 841; whilst in paper, 841, 832; what pleas, 841; in abatement, not allowed, 471; after verdict, by adding similiter, &c., 841; after nonsuit, 842; after new trial, 842; withdrawing pleas, &c., 210; for misprision of clerks, 842; from what amendable, 842; from draft under counsel's hand, &c., 842; what defects aided at common law, 842; what aided by statute of jeofails, 842, 843.

*Notice of set-off*, &c., 843; when not allowed, 843; of notice to dispute bankruptcy, 843.

*Demurrer*, 843; after demurrer, 479, 832.

*Writ of inquiry*, 843; what defects in, amended, 843; what aided, 843.

*Issue*, 843; what defects in, aided, 843; accepting of issue, &c., what a waiver of defects, 844; amendment at Nisi Prius, 844; immaterial issue not aided, 844; replender in case of, 844; amendment after verdict, 844.

*Jury process*, 844; for misprision of clerks, 844; by what amendable, 844; what defects in, aided after verdict, 844, 845; want of venire, aided after, 845.

*Nisi Prius record*, 845, 256; for misprision of clerks, 845; by the issue roll, 845; where one of defendants omitted, 845; mistake in jurata, 845; for variance between issue and record, 845; where postea lost, 845; at Nisi Prius, 282, 845, 846, 62, 831.

*Verdict, Postea*, &c., 846; in general not allowed, 846; to increase damages in mayhem, &c., 846, 313; mistake in recording verdict, 846; to enter verdict on particular counts, &c., 847, 310; by taking a judgment de melioribus damnis, 847; by a remittitur, 847; by taking a judgment at common law, in replevin, &c., 847. Special verdict, 847, 305; special case, 847; where record of Nisi Prius lost, 848.

*Judgment*, 848; during term of which it is signed, 848; after error brought, 848; in what respects, 848; when refused, 848; by what amendable, 848; what defects cured by verdict, or judgment by default, &c., 848, 849; where judgment roll lost, 849.

*Scire facias*, 849; for misprision of clerks, &c., 849; what defects amendable, 849; what cured by verdict, or judgment by default, &c., 849.

*Writ of error*, &c., 849, 331; not amendable at common law, 849; what amendable by statute, 849; costs on, &c., 850; in what Court amendable, 850, 831, 832; new bail on

- amendment, 850, 332; amendment in transcript, 850, 347; amendment of assignment, 850.
- Execution*, 850, 378; misprision of clerks, 850; what defects amendable, 851; by what amendable, 851; amendment refused, where third persons affected, 851; statutes of jeofails do not extend to, 851.
- Rules of Court*, &c., 851; may be amended, 851.
- Amends, tender of, plea of, by justices, &c., 493.
- Amercement, statement of, in judgment, 320.
- Ancient demesne, plea of, 472, 540; extending lands in, 405; county court, &c., cannot proceed in question of, 580.
- Ancient document, proof of, 240.
- Annuity, reference to compute, in action for, 510; staying proceedings in action in bond for, on payment of arrears, &c., 747; damages in action on, 307; when seizable under fi. fa. 391; when warrant of attorney to secure, set aside, &c., 496; execution in, set aside for excess, 502; clause of scire facias in warrant of attorney to secure, 493, 502; prudent to enter docket of judgment to secure, 501, 321; bond for, within 8 & 9 W. 3, c. 11, 522, 607; sci. fa. on judgment for subsequent arrears of, when necessary, 522, 607.
- Answer in equity, how proved, 233; in ecclesiastical court, how proved, 235; in admiralty court, how proved, 235.
- Apothecary, exempt from being juror, 290.
- Appeal, jurisdiction of Court of King's Bench as a court of, 4.
- Appearance, what, 183, n.; formerly parties must have appeared in person, 32; now may do so by attorney, 33; attorney's undertaking for, enforceable, 35, 39, 125; condition for, in bail bond, 124; how effected in a bailable action, 150; how entered, by defendant, on writ of summons, 453; by plaintiff for him, 453; affidavit for, 453; how entered, &c., after writ of distringas, 461, 462; to scire facias, 613, 614, 433, 434; in replevin, 582; upon exigi facias, 705; to reverse outlawry, 711; in ejectment, 538, 541; landlord cannot appear in for tenant against his consent, 539; must be entered before defendant can nonpross plaintiff, 789; must be entered before judgment by default signed, 505; amendment of, 837; what defects in, waived, 838.
- Appointment, of master, when to be attended to, 13, 39; not serving of appointment to tax costs on stay of proceedings, 750; on payment of money into Court, considered as intimation of plaintiff's intention to proceed in action, 744.
- of attorney, how, 33.
- Appraisal, &c., of goods under fi. fa., 390; under distress, 575.
- Arbitration.

1. *The reference.*

*Where there is a cause in Court*, 906; by order of Nisi Prius, 906; by judge's order, 906; where arbitrator had been previously consulted, 907; arbitrator cannot award greater damages than in declaration, 907.

*Where there is no cause in Court*, 907; by bond or written

agreement, &c., 907; by bond or agreement, &c., containing assent of parties to make submission a rule of Court, 907; by verbal agreement, 907; such an agreement cannot be made a rule of Court, 907; mode of execution, &c. of submission, 907; by whom, 907; attorney referring without authority, 39; what submissions may be made a rule of Court, 908; what the submission should specify, 908; form of clause as to making the submission a rule of Court, 909; submission cannot be revoked without leave of Court or a judge, 909; enactment of 3 & 4 W. 4, c. 42, 909; revocation by death of parties, 910; by marriage, 910; by bankruptcy, 910; agreement to refer does not oust the Courts of their jurisdiction, 910, 911; party may still bring an action, 911.

## 2. *The award.*

*Proceedings upon the reference*, 911; swearing, &c. of witnesses, 911; enactment of 3 & 4 W. 4, c. 42, 911; appointment from arbitrator, 911; notice of time and place of, &c., 912; laying statements before arbitrator, 912; procuring attendance of witnesses, 912; enactment of 3 & 4 W. 4, c. 42, 912; proceedings against the witness, 913; hearing before the arbitrator, 913; examining the parties themselves, 913.

*The award*, 913; stamp on, 913; how many copies, 913; where three arbitrators, 913; notice, &c. of award, 913; amendment of mistake in award, 913, 914.

*Time for making the award*, 914; when may be enlarged, 914; notice of enlargement, 914; mode of, 914; procuring leave of Court or a judge to enlarge, 914; enactment of 3 & 4 W. 4, c. 42, 914; objection as to enlargement, waived by parties' attendance, 915.

*Umpire*, 915; agreement as to, 915; how appointed, &c., 915, 916; stamp on, 916; refusing to act, 916; the umpirage, 916; arbitrators joining in, 916.

*Costs*, 916; where no cause in Court, 916; where a cause in Court, 916. Costs of reference, 916; when costs of reference are costs in cause, 916, 917; costs of action, 917; taxation of the costs, 917.

*How arbitrator's authority determined*, 918.

## 3. *Setting aside award.*

*In what cases*, 918. Court will not in general examine into merits, 918; where corruption, &c. in arbitrator, 918; ground for relief in equity is so at law, 918; where award does not pursue the terms of submission, 918; instances, 918; where award is of a debt due after submission, 918; award as to future differences, &c., 919; award of verdict to be entered, 920; award not made in limited time, 920; uncertainty in award, 920;

instances as to, 920; may be good in part, 920, 923; where award not a final settlement of differences, 921; one part of award inconsistent with the other, 922; award of illegal act to be done, 922; award on wrong stamp, 922; irregularity in proceedings before arbitrator, 922; arbitrator guilty of misconduct, 922; arbitrator refusing evidence, &c., 922; other instances as to, 922; waiver of irregularity in, 923; party's accepting a benefit under award, 923.

*How*, 923; where no action pending, 923; where action pending, 923; where a clause that submission may be made a rule of Court, 924; where award an absolute nullity, 924; when application to be made, 924; enactment of 9 & 10 W. 3, c. 15, 924; practical directions, 924; affidavit for, 924, 925; showing cause, 925; costs as to, 925; if rule discharged, no subsequent application allowed, 925.

#### 4. *Enforcing performance of award,*

*Where there is no cause in Court*, 925; when only by action on award, 925; form of action, 925, 926; when defendant may be arrested in, 81; affidavit of debt on, 86; plea to, 926; reference to compute in action on, 509; bond for performance of, within 8 & 9 W. 3, c. 11, 522; damages in action on bond for performance of, 307; enforcing performance where submission agreed to be made a rule of Court, 926; by attachment, 926; mode of procuring submission to be made a rule of Court, 926; taxing the costs, 926, 927; personal service of rule, 927; demand of money awarded, &c., 927; how demand to be made, 927; affidavit of service, and demand and refusal, 927; affidavit to procure the attachment, 927; motion for the attachment, 927; shewing cause against, 927; affidavits for, 929; what may be shewn for cause against the attachment, 928; against whom attachment will not be granted, 928; in what cases attachment refused, 928; when award lost, 928; where a party filed a bill in equity, 928.

*Where there is a cause in Court*, 929; where no verdict taken, 929; where verdict taken, 929; how to obtain judgment, 929; suing out execution, 929.

#### 5. *Other points as to.*

Attorney referring without authority, 39; bail, when discharged by, 427; sureties in replevin, when and how discharged by, 596; when award may be set-off against another award, 54, 55; how award proved, 236; plea of *puis darrein continuance*, 287.

Argument days, &c., of demurrers, &c., 59, 60, 479; of special verdict, 304; of special case, 306; on error, 352, 361.

Argumentative affidavit of debt insufficient, 84.



Array, challenges to, 292.

Arrest under Mesne Process.

*Who may or who may not be arrested*, 65—77. The royal family, &c. 65; peers, 65; members of the House of Commons, 66; ambassadors and their servants, 66; aliens, 67; judges, serjeants, barristers, &c. 68; attornies and officers of the court, 68; parties to suit, witnesses, 69, 114; clergymen, 115; bail, 70; bankrupts, 70, 115; insolvent debtors, 71; baron and feme, 71; corporators and hundredors, 73; executors, administrators, and heirs, 73; infants and lunatics, 73; seamen and soldiers, 73; where defendant ~~before~~ arrested for same cause of action, 75; where defendant arrested in different counties, 77; where defendant wrongfully arrested or detained in custody, 77.

*Amount of cause of action*, 78.

*In what actions in general*, 78; in assumpsit, 79; debt, 80; covenant, 81; detinue, 81; trespass, 82; case, 82; trover, 82.

*Affidavit for*, 82—95. See "*Affidavit to hold to Bail.*"

*When defendant will be discharged out of custody*, &c. 93.

*Process for*. See "*Capias, Writ of.*"

*Arrest itself, how procured and proceedings on*, 111; the warrant for, and bailiff appointed by, 112; officer must be present, 112, 118; blank warrant not allowed, 112; arrest of wrong person, 113; who temporarily privileged from, 113—118; sheriff's liability for arresting privileged person, 113, 409; by whom arrest made, 118; in a county palatine, 118; in a liberty, 118; when made, 119; where made, 119; must be in county, &c., 119; how made, 120; breaking open doors, &c., 120; what amounts to, 120; copy of writ to be delivered to defendant on, 120; where several defendants, 121; indorsement on writ of day of, 121, 108; detainer, 121; what done after arrest, 122.

*Other proceedings as to, bail bond on*, 122—125, see "*Bail Bond*;" security to plaintiff on, 125; deposit with sheriff on, 126; discharge of defendant without bail bond, 127; escape on, 128, see "*Escape*;" rescue on, 129, see "*Rescue*;" lodging defendant in prison on, 130; duty of sheriff as to, 130; in case of defendant's being ill, &c., 131; proceedings against sheriff after, 131; rule or order to return writ, 131—135; rule or order to bring in the body, 135—137; setting aside or staying proceedings against sheriff or on bail bond, 142—149; special bail on, 149—180, see "*Bail, Special*;" paying money into court in lieu of bail, 180, see "*Payment into Court.*"

*Costs where plaintiff recovers less than what he held defendant to bail for*, 859.

Arrest under Final Process, 411, 414. See "*Capias ad Satisfaciendum.*"

- Arrest of judgment, 852; in what cases, 852; motion for, 852; in what time to be made, 852, 318; costs on, 853.
- Articled clerks, 16—23. *See* "*Attornies*," "*Clerk to an Attorney*."
- Articles of ship, evidence of, 245.
- of war, proof of, 238.
- Assault, arrest in action for, when allowed, 82; change of venue in, 727; damages in, 311, &c.; new trial, for excessive damages in action for, 818; costs in, 856, 857. *See* "*Trespass*," "*Battery*."
- Assessment of damages, *see* "*Damages*." Consequences of want of, 511, 512; in debt on bond within 8 & 9 W. 3, c. 11, 522, 527.
- Assignee of debt, &c., affidavit of debt by, 85.
- of bankrupt, *see* "*Bankrupt*."
- Assignment of articles of clerkship, 19, 20.
- of bail bond, 139; *see* "*Bail Bond*."
- of replevin bond, 595. *See* "*Replevin Bond*."
- Assignment, new, 213. *See* "*New Assignment*."
- Assignment of breaches in debt on bond, 522, 526.
- Assignment of errors, 347, 359, 365; when must be made, 347, 359, 365; practical directions, 348, 359; what may be assigned, 348; where several plaintiffs in error, 349; form of assignment, 349; assignment of want of warrant of attorney, &c. 349; certiorari on, 350; notice of assignment, 350.
- Assignment of prisoner's effects under Lords' Act, 655, 656.
- Assizes, when held, &c., 61; considered but as one day, 603; award of venire in trial at, 216, 217; notice of trial at, 224; judgment as in case of a nonsuit, in causes triable at, 806, 807; power of judges to make orders on, 62; bail put in on, 153, 177.
- Associate, 9, 12; duty, &c. of, as to postea, 314.
- Assumpsit, jurisdiction of the court in, 2; corporation cannot sue or be sued in, when, 620, 621; when defendant may be held to bail in, 79; what plea a nullity in, 202, 203; change of venue in, 727; damages in, 307; judgment in, 320; judgment by default in interlocutory, &c., 504, 505; writ of inquiry in, 509, &c.; costs in, 320, 855; execution in, 377.
- Attachment, generally.
- In what cases*, 930; for contemptuous expressions on service of process, &c. 930; on return of rescue, 930; against attornies or officers for misbehaviour, &c. 930, 35, 39, 40; against sheriff for not returning writ or bringing in the body, &c. 138, 931; against sheriff for not taking a replevin bond, 931; for disobeying process of Court, 931; again witness, 931; for disobeying rule of Court or Judge's order, 931; shewing the rule, &c. 931; for not paying costs, 932; for not paying debt, &c. 932; for abusing process of Court, 932; forging, &c. process, 933; for turning party out of possession after habere facias possessionem, 544; contempts committed in face of Court, 933; for not

paying officers' fees, 933; against peers, member of parliament, &c., 933; against executors, 933.

*The attachment*, 933; affidavit to obtain it, 933; when rule absolute in the first instance, 933, 934; when a rule nisi, 934; when cannot be moved for on last day of term, 934, 60, 134, 137; proceedings on rule granted, 934; service of, 934; affidavit of service, &c. 934; form of attachment, 934; execution of, 934; procedure on, 934; return to, 935; alias writ, 935; bringing defendant into Court, &c. 935; recognizance on, 935; bailing defendant, 935; notice on, 935.

*Interrogatories, &c.*, 935; when and in what cases to be exhibited, 935, 936, 937; answering them, 936; practical directions as to, 936; examination of parties on, 936; reference to master, 936; proceedings before master, 936, 937; his report, 937; judgment of Court on, 937; costs, &c. 937; clerks in court generally conduct the business, 937; when defendant has merely to pay the debt and costs, 987.

#### Attachment.

*For not returning writ*, 133; when contempt purged, 133; no laches must take place, 132; when and how moved for, 134; affidavit for, 134; the writ, 138; proceedings on, 138; setting aside or staying, 142, 146. *See "Sheriff, Proceedings against."*

*For not bringing in the body*, 137; when contempt purged, 136; no laches must take place, 137; when moved for, 137; affidavit to support it, 137; the writ, 138; proceedings on, 138; setting aside or staying, 142, 146. *See "Sheriff, Proceedings against."*

Attachment for not returning writ of execution, 384.

----- for non-payment of money or costs, &c., 932.

----- for non-performance of an award, 925, 926, 927.

----- against witness for not obeying subpœna, 248.

----- against attorney for not appearing, &c., 930, 35, 39; for misconduct, 40; attorney endeavouring to avoid service of, 41.

Attachment of privilege abolished, 3, 441, 629.

Attachment, foreign, attorneys not privileged against, 31.

Attainder, *see* "*Conviction*." Persons attainted cannot be jurors, 290.

Attaint, writ of, abolished, 286.

Attesting witness, proof by, 239, 242.

#### Attornies.

*Articled Clerks, &c.*, 16; who shall take, 16; how many, 16.

The articles, 16; to whom the clerk may be articulated, 16.

Affidavit of execution, 17. Enrolment of articles, 18.

Service, 19. Assignment of articles, 19, 20. Affidavit of

service, 20. Notice of intention to apply for admission,

20. Entry of name, &c. at judge's chambers, 21. Affi-

davit of stamp duty being paid, 21. Examination, 21.

Swearing, 22. Admission, 22. Enrolment, 22.

*Attornies, their Privileges, &c.*, Certificate, 23; neglect to take it out, 24, 151; neglect of agent to take it out, 32; their re-admission afterwards, 24, 25. Entry of name in book at King's Bench office, 26. Admission in other courts, 26. Practising in name of another, 26. Allowing unqualified person to act in his name, 26; Agents to attornies, 27; attorney, prisoner, 28; Services of notices, &c. upon attornies, &c. 29; Indorsement of name, &c. upon mesne process, 29, 107, 447, 460; Stating abode of client, 29, 107, 447, 460; Deeds, writings, monies, &c. in their hands, 30. Privileges of attornies, 31; exempt from serving what offices, 31; from being jurors, 290; Process in actions by or against, 31; cannot in general be holden to bail, 31, 68; when otherwise, 32, 68; how discharged on arrest, 69; no privilege against a foreign attachment, 31; how far subject to jurisdiction of court of requests, 874; Not bound to disclose in evidence confidential communications, 32. Disabilities of attornies, 32; what offices they cannot serve, 32; neither they nor their clerks can be bail above, 32, 169; consequences of becoming so, 140, 170; under-sheriff must not act as attorney, 16; Expenses of, as a witness, 249.

*Attornies, Appointment of, to sue and defend, &c.* 32. Suing or defending by attorney, 32. Attorney, how appointed, 33. Promise by third person to pay bill must be in writing, 33. When court will name an attorney to conduct a suit, &c. 33. Warrant, when to be filed and entered, 33. Memorandum of warrant, 35. When bound to act, &c. 35; though client do not furnish funds, 35, 36. When and how client may change his attorney, 36; in bringing error, 329; consequences of not properly changing, &c. 37, 151, 163. Continuance of his authority, 37. Acting without authority, 38; when must be present, &c. on execution of cognovit or warrant of attorney, 488, 492.

*Attornies, their Duties and Undertakings, and how punished for Misconduct or Negligence*, 38—44; duties to the Court, 38; to write defeazance on warrant of attorney, 492; duties to their clients, 39; undertakings of, how far may be enforced, &c. 39, 125, 161; misconduct of, when and how punished in a summary way, 40; ignorance or negligence, &c. of, how and when liable for, 41, 42; fraud or malpractice of, 43; when Court will compel him to answer matters of affidavit, 43; attorney convicted of forgery, &c. practising, when liable for, 43; new trial, &c. for absence, &c. of, 821, 273; putting off trial for illness, &c. of, 798; indorsement of name, &c. on process, 107, 447, 460; when to disclose client's residence, 107, 447, 460; consequence of striking off the roll, 43.

*Attornies, striking off the Roll at their own Request*, 44.

*Attornies, delivery of their Bill, Taxation of, and Remedy for*

*Costs*, 44—55. Delivery of the bill, 44; in what cases, 44—47; how to be made out, 44, 47; how to be delivered, 47; in what time, 48; how you may compel delivery of, 48. In what cases taxable, 49, 44—47; consequences of compelling a taxation, 49; how compelled, 50; when, 50. Taxation of it, 48; costs of taxation, 51. Remedy for costs, 51; action for, and evidence in, 51, 52; what a defence to, or not, 52, 53; Lien for costs, 53. When compellable to deliver up papers, &c. 53; how far costs of separate judgments, &c. may be set off to the prejudice of his lien, 54, 55.

**Attornies and Officers of the Court.**

*Actions by*—privilege of suing by attachment of privilege abolished, 629; that ancient privilege considered, 629, 630; must now sue by the new process, 630; other privileges still exist, 630; but he must sue as an attorney, 630; delivery of bill of costs before action, 44, 51; bail put, &c., or appearance entered as usual, 630; time to declare and plead, same as usual, 630; may lay and return venue in Middlesex, 630.

*Actions against*—former privilege of being sued by bill abolished, 631; that privilege considered, 631; must now sue by the new process, 632; when subject to court of conscience acts, 632, 874; verdict for less than 40s. Judge may certify as to costs, 632; cannot in general be holden to bail, 31, 68, 632; when he loses that privilege, 631, 632; discharge of, on improper arrest, 632; application for, 682, 69; when put to his plea of privilege, 632; appearance, &c. entered as usual, 632; time for declaring, &c. as usual, 632; no peculiar privilege of changing venue into Middlesex, 633; time for pleading by, 633; ca. sa. against, 408, 409; other proceedings against as usual, 603.

Attornment of tenants after ejectment, 555.

Auction, selling goods under fi. fa. by, 390; expenses of, when not allowed, 386, 391.

Audita querela, writ of, 289; pleas, &c. in, must be delivered, 208; demurrer book, &c. in, to be made up by attorney, 476; after elegit, 405; after sci. fa., 614, 615.

Authority of attorney, 33—38.

*Autre action pendent*, plea of, 470; staying proceedings in case of, 750.

*Autre droit*, see "*Executor*," "*Bankrupt*."

Available judgment, error quashed after undertaking to give, 332, 333.

Avowry in replevin, 586.

Award, see "*Arbitration*."

Award of venire facias, 216, 217; suggestions in, 869; of mittimus into county palatine, 218; of elegit, proof by, 230; of writ of inquiry, 512; amendment of, 513; award of inquiry, &c. in replevin, 585.

## B.

Bachelor of arts, &c. articles of clerkship of, 16.

Bail, holding to, who may be held to, 64—78. See "*Arrest.*" In what actions, 78—82. See "*Arrest.*" Affidavit for, 82—95. See "*Affidavit to hold to Bail.*"

Bail Bond, generally:

How taken, 122; in what cases, 123; without any arrest, 123; when to be executed, 123; for what sum, 123; form of the bond, 123; the condition, 124; how many persons to be bail, 125; consequence of bond being void, 125; when defendant arrested by wrong name, 100, 125; attorney's undertaking for, void, 39; security to the plaintiff, 125; discharge of defendant without a bail bond, 127, 128; escape, 128; taking assignment of, discharges sheriff, 132, 139.

Bail Bond, proceedings upon.

*Assignment of bail bond*, 139; in what cases, 139; may be in any county, 139; sheriff bound to assign, 139; when most advisable to take, 131, 139; how compelled, 139; not after allowance of bail, 139; after render, &c., 139; consequences of sheriff's refusal, 139; assignment bars proceedings against sheriff, 139; when and how assigned, 139; cannot be made pending body rule, 139; not before forfeiture, 139; by whom, 140; effect of it, 140; when bond void, 140; plaintiff must not proceed in original action, 140.

*Action on bail bond by plaintiff*, 140; though the plaintiff a bankrupt, 140; when bond forfeited, 140, 141; when action to be brought, 140, 143; where persons become bail who ought not, 140; pending body rule, 141; how many days must expire after appearance day of capias, 141; how many actions allowed, 141; where two bail bonds taken by mistake, 146. Where brought, 141. Venue, 142. Holding to bail in, 70, 80, 142; assessment of damages in, not necessary under 8 & 9 W. 3, c. 11, 522.

*Action on bail bond by sheriff*, 142; may be in any court, 142; declaration in, 112.

*Setting aside proceedings on bail bond for irregularity*, 142; instances of irregularity, 142, 143; after render, 139; death of principal, 145; death of plaintiff, 145; bankruptcy of principal, 145; principal an alien, &c. 146; taking a cognovit, 144, 148; laches of plaintiff, 144; where action on bond against good faith, 144; injunction, 144; by other causes, 143; not necessary to put in bail, &c. where proceedings are irregular, or against good faith, 146.

*Staying regular proceedings on bail bond*, 146; power to stay proceedings given by statute, 146; when application to be made, 148; terms imposed on, 146, 148; where trial lost,

bond to stand as a security, &c. 147; affidavit of merits, &c. 147; putting in bail, &c. 147, 148; what the bail will have to pay, 149; what costs, 149.

**Bail to the Action, put in and justified in Town.**

*What and in what cases requisite*, 149, 150; what they undertake, 149; how many persons, 149; what a waiver of, 150.

*Who may be bail*, 150, 168, 169; attorney held responsible for purposely putting in insufficient bail, 40, 151.

*By whom put in*, 151; by sheriff, 151; by bail to sheriff, 151; by attorney, 151; by new attorney, without changing, 151, 37.

*When put in*, 151; when it may be, 151, 152; when it must be, 151; when attorney's undertaking to put in enforceable, 39; putting in and justifying at same time, 152; time to plaintiff to inquire after, 152, 173; time to put in after a rule staying proceedings is discharged, 152; further time, when and how allowed to put in, 152.

*How put in*, 153; practical directions, 153; bail piece, 153; form of, 153; if defective, ground for opposing bail, 154.

*Notice of putting in*, 154; when to be given, 154; form of, 154; by whom given, 155; how served, 155; consequences of defect in, 156.

*Affidavit of sufficiency accompanying notice of bail*, 156; when to be given, 156; form of, 156, 157; practical directions, 157; costs after excepting to bail making this affidavit, 157; bail deemed justified if not excepted to, 157.

*Accepting of, or excepting to*, 157; plaintiff should be cautious in excepting to, 158; as he may have to pay costs of justification, 158; when one day only allowed to except, 158; when twenty days allowed to except, 158; not necessary to except to added bail, 158; nor to bail not put in in time, 158, 159; excepting to, before sheriff is ruled, 159; when plaintiff precludes himself from excepting, 159; by not excepting in time, bail deemed accepted, 159; plaintiff cannot afterwards treat bail as nullity, &c. 159.

*Entering and notice of exception*, 159; entering of, absolutely requisite, 159; when must be entered, 160; not necessary if bail not put in in time, 160; notice of, absolutely requisite, 160; when given, 160; form of, 160; in vacation, requiring a justification at chambers, 160.

*Adding bail*, 161; cannot be added without leave, 161; practical directions, 161; notice of putting in, 161; exoneration of former bail, 162; must justify whether excepted to or not, 162.

*Notice of justification*, 162; of justifying bail at time of putting in, 162; time for plaintiff in such case to inquire after, 162; time for justifying, and notice of justification in other cases, 162; two days' notice of justification in all cases sufficient, 163; one day's notice will do if the bail be those

originally put in, 163; but two days requisite on added bail, 163; how to proceed if last day appointed be a holiday, 163; or last day of term, 162; form of notice, 163; must not be of more than two bail without leave, 163; service of, when and how, 163; notice of justification waives defects in notice, &c. of exception, 164.

*Justification, when and how*, 164; when bail justified at same time of putting in, 164; in other cases, 164; what a waiver by plaintiff of necessity for justification, 164; bail not justifying bail bond may be assigned, 164; then bail may have names struck out of bail piece, 165; must justify in open court, 165; or at chambers, 165; practical directions, 165; sittings of bail court, 165; 59; bail should be punctual in attendance, &c. 166; what bail must swear to, 166.

*Opposing justification of*, 166; justify as of course, unless opposed, 166; opposition does not waive right of proceeding against sheriff, or on bail bond, 166; practical directions, 166; affidavit for opposing, 166; what questions may be put, 166; opposing bail in two actions, 167; omission of counsel to oppose, 167. Grounds for opposing, 167; defect in notice of bail, 167; or in service of, 167; defect in notice of justification, 167; or in service of, 167; not much use in these objections, 167; no bail bond taken, and action for escape brought, 167; bail not housekeeper or freeholder, 168; bail not worth enough, 168; bail, &c. receiving parochial relief, 168; not knowing whether he was arrested, &c. 169; being a foreigner, 169; having no property here, 169; having privilege of parliament, 169; king's or ambassadors' servants, &c. 169; living in verge of palace, 169; having been bail before, 169; before rejected as bail, 169; book kept by master to ascertain names, &c. of rejected bail, &c. 169; not knowing defendant, 169; that bail is an attorney, 169; or clerk, &c. of, 169; indemnified by attorney, 170; being sheriff's officer, &c., 170; or person concerned in execution of process, 170; indemnified by officer, 170; having been pillored for perjury, 170; being a gaming-house keeper, 170; outlawed, 170.

*Costs of opposition*, 170; when defendant must pay after successful oppositions, 170; deposit of money with master to satisfy costs, 170; when plaintiff must pay after unnecessary exception, 170; if plaintiff alarm bail, 171.

*Further time for justifying*, 171; when allowed, 171, 172; when not allowed, 172; judge will not interfere with other judge's order for, 172; where only one bail attends, 172; summons for, 171; affidavit for, 172; practical directions, 173.

*Time for plaintiff to inquire after*, 173; when allowed, 173.

*Rule of allowance*, 173; practical directions as to, 173; bail



not perfected until drawn up and served, 173; setting aside, if improperly allowed, 174; bail cannot apply to court until allowed, 174; supersedeas requisite to get defendant out of custody after allowance, rule for allowance not enough, 174.

*Filing bail piece*, 174; practical directions, 174; when ought to be, 174; entry of recognizance on roll, 174, 431.

*Fraud, &c. in procuring justification. Perjury. Personating bail*, 175; setting aside rule of allowance, 175; indictment, 175; summary punishment, 175; felony to personate another, 175; assuming feigned names, 175.

**Bail to the Action, *put in in the Country.***

Before whom to be put in, 175; by whom, when, and how put in, 176; practical directions, 176. When and how transmitted, 177; practical directions, 177. Notice of bail, 177; exception, 177; notice of justification, 178; justification, &c. 178.

**Bail to the Action, *put in and justified when defendant is in Custody.*** How in term time, 179; how in vacation, 179.

**Bail to the Action, *Paying money into Court in lieu of.***

Where defendant has deposited money with sheriff in lieu of bail to him, 180; where he has not done so, 180; proceedings in either case, 180; effect of bankruptcy on deposit, 181; practical directions, 181; taking money out of court, 181; on judgment for plaintiff, 182; on judgment for defendant, 182; on defendant perfecting special bail, 182.

**Bail to the Action, *Liability of.***

To what amount for debt, 415; for costs of action, 415; for costs of error, 415, 416; interest, 416, court will relieve them on payment, 415, 416; when application for should be made, 416; remain liable while names on bail piece, 416.

**Bail to the Action, *how Discharged.***

By death of principal, 416; by his discharge under insolvent act, 417; by his bankruptcy, 416; by render, 418; *see "Render;"* by variance between declaration and writ on affidavit, &c. 425; by other causes, 427; for not declaring in time, 427; by referring to arbitration, 427; by not obtaining judgment, 427; by payment, 427, 415, 416; by not recovering on cause of action in affidavit, 427; by execution against a principal, 427, 435; by his becoming a peer, &c. 427; by his conviction, &c. 427; by his impressment, 427; by his being an alien, 427; by act of state, 427; by detention abroad, &c. 428; by cognovit, 428; by taking bills, 428; by giving time, 428; by proceedings in equity, 428; by injunction, 428; by bail becoming witness, 428; when application should be made pending error, 416; exoneretur, when to be entered, 429; proceedings against, after exoneretur, irregular, 429.

**Bail to the Action, *Proceedings against them.***

*Ca. sa. against the principal*, 429; must be sued out, 429; form of, 429; when judgment must be revived, 430; what

- irregularity in may be taken advantage of, 480; and how, 430; lodging ca. sa. in sheriff's office, 430; return of non est inventus, 430; ca. sa. must not be sued out pending error, 430; ca. sa. after levy of part, 430; new ca. sa. to fix new bail after render of principal, 430, 431.
- Entry of recognizance on the roll*, 431; when requisite, 431; form of entry, 431.
- Scire facias against bail*, 431; form of, 431; when several writs necessary, 431, 432; when may be sued out, 432; teste, and return of, 432; venue in, 432; proceedings on two nihilis abolished, 432; judgment cannot be obtained unless bail summoned, 433; or leave granted, 433; what you must do to obtain that leave, 433; notice to bail, 433; affidavit for leave, 433; rule to appear, 433; appearance, 434; staying proceedings against, pending error, 338; execution against, 434, 435; after taking principal in execution 435.
- Action of debt against*, 434; several actions, 434; arrest in, not allowed, 70, 114; venue in, 434; execution in, 434; after taking principal in execution, 435.
- Bail in Error, to Exchequer Chamber.*  
In what cases necessary, 341; when to be put in, 343; how put in and justified, 343; how far liable, 435, 345; proceedings against them, 436; scire facias, 436; debt, 436.
- Bail in Error to House of Lords*, 358.
- Bail in Error from inferior courts to King's Bench*, 362.
- Bail in Error coram nobis*, 368, 343.
- Bail in Error in Ejectment*, 552, 568.
- Bail in Ejectment on 1 Geo. 4, c. 87*, 564.
- Bail upon an Attachment*, 935.
- Bail upon Outlawry*, 706.
- Bail on Habeas Corpus, &c. on removal of cause from inferior court*, 720, 721, 722. See "*Removal of Causes.*"
- Bail Court*, 59, 165, 166.
- Bail Book*, 160.
- Bail-piece*, its requisites, 153; consequences of defect in, 154; adding bail on, 161; when and how to be filed, 174, 431; when and how transmitted in country bail, 177; when amendable, 837; bail liable as long as their names remain on, 416; exoneretur on, 429, see "*Bail to the Action, Liability of, and how discharged.*"
- Bailiff*, of sheriff on mesne process, 112; on final process, 382, 392, 410; special bailiff, 112, 383; bailiff of franchise, when writ to be directed to, 98; return of writ directed to, 384; bailiff cannot be bail above, 170; attorney cannot be, 32.
- Banc*, sittings in, 58, 59.
- Bank notes*, tender of, need not be negatived in affidavit of debt, 90 not seizable in execution, 392.
- Bankers' books*, proof by, 243.

**Bankrupts, or their assignees.**

*Actions by*, 682; when assignees to sue, 682; when bankrupt may sue, 682; on bail bond, 140; consent of creditors not necessary to action by assignees, 682; all the assignees should sue, 682; where one of several parties a bankrupt, 682; official assignee, 682; new appointment or death, &c. of assignees, 682, 683; consequence of bankruptcy of plaintiff after action brought, 683; who may continue it, &c. 683; security for costs, 763; scire fa. for assignees to become parties to the record, 683, 606; process in action, 683, 101, 102; when defendant may be arrested a second time after plaintiff's bankruptcy, 77; affidavit of debt by assignees, 85; declaration, 683; notice to dispute assignees' title, bankruptcy, &c. 683, 684, 207, 210; costs, &c. 684; double costs, 685.

*Actions against*, 685; assignees cannot be sued as such, 684; remedy for dividends, 685; arrest of assignee, 685; process, 685; permanent privilege of bankrupt from arrest, 70, 409; temporary privilege from, 116, 117; discharge from arrest, 70, 116; after outlawry, 707; when bail discharged by certificate of bankrupt, 685, 416, 417; render on, 417; time to render on, 420; how far sheriff or bail below discharged by, 136, 145, 148; effect of bankruptcy of defendant after deposit with sheriff in lieu of bail, 126, 181; declaration, 685; plea, 686; counsel's signature, &c. to, 686, 207; nolle prosequi where one defendant pleads his bankruptcy, 686; costs on, 686; notice to dispute bankruptcy, &c. 686, 207, 210; proof of debt how far a discontinuance of action, &c. 686; formal discontinuance not necessary, 687; staying proceedings on obtaining certificate, 688; costs, 688, 684; ca. sa. against bankrupt, and his privilege from arrest, 409, 70, 116; discharge from, 689, 409; proof of debt in case of, 689; fi. fa. in case of, 394; elegit, 688; consequences of defendant having been twice a bankrupt, and not having paid 15s. in the pound, under the second commission, 688, 689; the property, &c. in that case vests in assignees, 688; creditors cannot touch it, 689.

*Other matters as to*, bail may arrest bankrupt, in order to render, 423; bankrupt cannot justify as bail, 168; scire facias against, when an executor, 601; scire facias in case of bankruptcy of parties, 606; proceedings against member of parliament, subject to bankrupt laws, 618; witness attending bankruptcy proceedings privileged from arrest, 114, 115; how proved, 234; set off in, 53; of attorney, effect on clerkship, 20; on lien, &c. of, 31; bill for business in must be delivered, when, 45; does not affect his representative character of executor, 601; party, a bankrupt, need not be joined in action, and replication, &c. of, 469; bankruptcy

- no abatement of writ of error, 334; sci. fa. for execution in case of, 600; seizure of goods in execution in case of, 394; when act of bankruptcy on same day, 394; on fraudulent execution, &c. 394; execution levied two months before fiat issued, 394, 395; execution on judgment on warrant of attorney or cognovit, 395; filing of warrant or cognovit 488, 489, 497; execution on after-acquired goods, 396.
- Bar, *see* "*Trial at bar*," "*Counsel*," "*Attorney*."
- Bargained goods, arrest for, not allowed, 79.
- Baron and feme. *See* "*Husband and Wife*."
- Barratry in an attorney, how punished, &c. 43.
- Barrister, *see* "*Counsel*."
- Battery, *see* "*Assault*," "*False Imprisonment*," "*Trespass*." Increasing damages in, 313; new trial for excessive damages in, 818; costs in, 856, 857.
- Belief, when affidavit of debt sufficient on, 84.
- Benefice, warrant of attorney to secure charge on, set aside, 496.
- Berwick upon Tweed, direction of writ to, 99; award of venire, &c. in, 870.
- Bill, proceedings by, abolished, 3, 31, 631, 635; except in ejectment, 4, 529. Issue and imparlance in ejectment by, 545, 546; want of, formerly assigned for error, 348, n. (k); amendment of, 835.
- of attorney, delivery of, 44—48; taxation of, 48; costs of taxation of, 51; remedy for, 51; lien for, 53; mistake in, when not material, 47.
- of exchange, affidavit of debt on, how to be framed, 87, 88; change of venue in actions on, 727; consolidating several actions on, 734; staying proceedings on payment of debt and costs, 746; where several actions on, 746; evidence in actions on, 242; reference to compute on, 509, 520; execution in several actions on, 375, 378.
- in equity, how proved, 233; agreement in cognovit, &c. not to bring it, 487; to stay ejectment, &c. for non-payment of rent, &c. 562, 749.
- of exceptions, and proceedings thereon, 283, 298; sci. fa. against executor of judge, to certify, 610.
- of Middlesex, abolished, 3.
- of particulars, *see* "*Particulars of Demand*."
- Bishop, proceedings by a sequestrari facias, &c. 695, 696; of Durham, direction of writs to, 98.
- Blank warrant not allowed, 112, 15; blank writ not to be sealed, 13.
- Board and lodging, affidavit of debt for, 88.
- Board of green cloth, arrest by leave of, 120.
- Body, rule to bring in, 135; how complied with, &c., 136. *See* "*Sheriff, Proceedings against*."
- Bond, *see* "*Debt*," "*Deed*," "*Bail Bond*;" arrest in action on, for what sum, &c., 80; affidavit of debt on, 87, 85; mode of declaring on, where bond within 8 & 9 W. 3, c. 11, 526; staying proceedings on payment of penalty of, &c., 747; particulars

- of demand in action on, 773; damages in action on, 307; writ of inquiry, &c. in action on, in 8 & 9 W. 3, c. 11, 522, 511; what bonds within that act, 522; defendant liable only to extent of penalty, 523; when penalty paid, satisfaction on record to be entered, 523; execution on, 526; sci. fa. on judgment on further breaches, 523, 607; bond to indemnify the sheriff on an execution, good, 399.
- Books, of account, &c., entries in, how proved, 243; of corporations and public companies, proof by, 237; in the herald's office, proof by, 236; bail book, 160.
- Borders, affidavit to set aside arrest, &c. on, 119, 449; service of writ, how far allowed on, 448, 449.
- Bottomree bond, reference to compute in action on, 510.
- Boundaries, execution of writ, when a dispute as to, 119, 449; affidavit to set aside service on, 449.
- Breaches, suggestion, &c. of, in debt on bond, 522, 524, 526; particulars of, in ejectment, 543.
- Breaking open doors, 120, 555; in distress for rent, 574; to replevy goods, 579.
- Brief, 267.
- Bringing back venue after change of, 729.
- Bristol, direction of writs to, 98.
- Burial, proof of register of, 237.
- Business of the court, &c., 56—62.
- By the bye, declaring by, seems abolished, 188.

## C.

- Calendar keeper, 9; almanack<sup>c</sup>, proof of, 238.
- Cambridge, direction of writ into isle of Ely, 99.
- Candle lighter to yeoman of guard privileged from arrest, 65.
- Canterbury, direction of writ to, 98.
- Capias ad Respondendum, writ of, generally.
- In what cases and by and against whom issued*, 4, 95; lies for commencing any personal action, 95; lies by or against any person, 95.
- Form of the writ*, 95, 96; memoranda to, 96; statute imperatively requires form to be used, 97.
- Direction of*, 97; to any sheriff, &c. in England, 97; in Wales, 97; when sheriff a party, 97; when directed to elisors, &c., 97; when district parcel of one county and situate in another, 97; when to be executed in a liberty, 98; non omittas clause, 98; when city, &c. a county of itself, 98; what cities, &c. have two sheriffs, &c., 98; when issued into county palatine, 98; into Berwick, 99; into Cinque Ports, 99; into Ely, 99; consequences of misdirection, 99.
- Parties' names in*, 99; consequences of misnomer of plaintiff's

- name, 99; misnomer of defendant's name, 99; when may sue him by initials, &c., 99; when defendant waives misnomer by executing bail bond, &c., 100; by putting in bail, &c., 100; consequences of misnomer of defendant's name, 101; sheriff not bound to execute writ, 101.
- Character in which plaintiff sues or defendant is sued*, 101; need not be stated, when, 101; as when suing as executor, &c., 101; when a variance in, 102.
- Number of parties in*, 102; names of all parties must be stated, 102; consequences of omission, &c., 102; when need not declare against all the defendants, 102; against husband and wife, 102; serving copy of writ on one of several defendants, 121.
- Addition and place of abode of parties in*, 103; when not necessary to state plaintiffs, 103; what description of defendant requisite, 103; indorsement as to, 103, 108; consequences of omission, &c., 103.
- Cause of action in*, 103; must be stated correctly, 103; consequences of defect in, 103, 104.
- Return of*, 104; return of former writs, 104; no particular day specified in, 104; the eighth day after the execution is the return, 104; exception as to certain days, 104; how long writ in force, 106; statement in what court defendant to appear, 104, 105; sheriff to return writ, &c., 105; rule or order for, 131—135; attachment for not returning it, 137.
- Date and teste of*, 105; of former writs, 105; may now be in vacation, &c., 105; must be on day of issuing, 105; mistake in date when cured, 105; may be in figures, 105; writ must not be issued before cause of action complete, 105; consequences of so issuing it, 105; must be tested in name of chief justice, &c., 106; officer issuing it must set down on same date of issuing, 106.
- Duration of*, 106; remains in force four calendar months, &c., 106.
- Memoranda to be subscribed to*, 106, 96; consequences of omission or mistake in, 106.
- Indorsements on*, 106; sum specified in affidavit of debt, 106; consequences of omission, &c. of, 106; form of, 107; name and place of abode of attorney, &c., 107; or person issuing it, 107; demand of name, &c., 107; consequences of omission, &c., 107; form of, 107; place of abode, &c. of defendant, 108; consequences of omission of, 108; amount of debt, 108; form of, 108; consequences of omission, &c. of, 108; day of execution of, 108; when such indorsement to be made, 108; consequences of omission, 108; form of, 109.
- Mode of suing out*, 109.
- How executed*, &c., 111. See "Arrest."

*Alias and pluries writs, if not executed*, 109; when issuable, 109; form of such writs, 109, 110; should correspond with preceding writ, 110; no fresh affidavit of debt requisite, 110.

*Defects in, when and how taken advantage of*, 110; writ not void, 110; when defect in waived, 110.

*When amended*, 111, 850.

*Capias ad Respondendum in replevin*, 583.

*Capias ad Satisfaciendum*, generally. As to writs of execution in general, see "*Execution, Writ of*."

*What and when it lies*, 408, 409.

*Who may be arrested under*, 408; who privileged from, 409; discharging privileged persons on arrest, 409.

*Form of the writ*, 409; direction, teste, and return, 378; must pursue judgment, 409, 376; in case of misnomer, 409; alias, pluries, and testatum, 409, 410.

*When to be sued out*, 410, 373, 374; before return of fi. fa., 376; when part levied, &c., 410; after elegit, 410.

*How sued out*, 410; how indorsed, 410; practical directions, 410.

*When and where executed*, 411, 380; how executed, 411; carrying defendant to gaol, &c., 411; what an escape, 411, 412; retaking after, 411; searching for detainers, 412; remedy for escape, 412; rescue, 412; remedy for, 412; payment of debt, &c. to sheriff not good, 412; payment to attorney for plaintiff is, 412.

*When and how returned*, 412, 413, 383; how return compelled, 383, 131—135; not usual to return unless ruled, &c., 413; when necessary to return, 413; what return sheriff should make, 413; effect of return, 385; remedy for false return, 413; proceeding to outlawry, 413.

*Poundage and expenses*, 413, 387.

*What writs may issue after it*, 413; alias or pluries ca. sa., 413; when once executed, no other writ after, 413; if the defendant die in execution, 414; fi. fa. issuable if defendant not charged in execution, 376.

*How far a discharge of judgment*, 414; if defendant arrested, plaintiff no other remedy, 414; though discharged by his own consent, &c., 414; when otherwise, 414.

*Irregular ca. sa.*, 414, 388.

*Capias ad Satisfaciendum to fix Bail*.

When to be issued, 429; form of, 429; lodging in sheriff's office, 430; return on, 430; not to be sued out pending error, 430; ca. sa. for residue, 430; render before return of, 438; irregularity in, 430.

*Capias Utlagatum*, 706, 707.

*Capias in Withernam*, 577, 579, 594; sci. fa. after, 609.

*Capiatur pro fine*, 320; omission of, in judgment not material, 320.

*Carrier*, change of venue in action against, 728, 727; payment of

- money into Court in, 737; contribution in case of verdict against, 309.
- Case, jurisdiction of the court in ~~actions~~ on the, 2; when arrest allowed in, 82; payment into Court in, 737; staying proceedings in, on paying damages, &c. 748; or bringing into Court goods converted, &c., 748; judgment by default in, is interlocutory, 504; writ of inquiry in, 509; damages in, 307; final judgment in, 320.
- Case, special, *see* "*Special Case*;" attorney preparing false one guilty of contempt, 41.
- Case stated from a court of equity, proceedings upon it, 467. *See* "*Special Case*."
- Cassetur breve, 796; proceedings on, 796.
- Casual ejector, judgment, &c. against, in ejectment, 536; execution against, 537, 553.
- Cattle, seizing, &c. under a distress, 573, 575.
- Cause of action, statement of, in affidavit of debt, 84; in writ of *capias*, 103; in writ of summons, 444; in bail bond, 124.
- Cause, entry of, for trial, 265.
- Cepi corpus, return of, to *capias*, 133; to *ca. sa.*, 413.
- Certificate, of attorney, 23—26; of bankrupt, effect of, *see* "*Bankrupt*;" of bishop, proof by, 237; of consul, proof by, 237; of judge, as to special jury, 280; as to immediate execution, 286, 316, 373; for immediate execution in ejectment, 551, 553; by sheriff to stay judgment, &c. on execution of writ of inquiry, 519; of judge, under 43 Eliz. c. 6, to deprive plaintiff of costs, 855; under 22 & 23 Car. 2, c. 9, to entitle plaintiff to costs, 850; under 8 & 9 W. 3, c. 11, to entitle plaintiff to costs, 858; under 4 & 5 Ann. c. 16, where several pleas, 865; as to double costs, 868; of filing common bail of outlawry, 711; of payment of debt and costs, &c., on such reversal, 712; of gaoler, &c. on render of defendant by bail, 422, 425.
- Certifying the record in error, 346, 347, 358, 362.
- Certiorari, when it lies to remove a cause from inferior court, 718, 4, 581; upon *nul tiel* record pleaded, 485; to remove cause to have execution, 719; form of, 719; affidavit for, 720; how sued out, 720; delivery of, to judge of inferior court, 720; how obeyed and returned, 720; return of record on, 720; bail on, 720, 721; filing common bail on, 721; *procedendo* on, 721; effect of *procedendo*, 722; proceedings after removal, 722; plaintiff, when compellable to proceed, 722, 538; declaration, 723; plea, 723; costs, 723; to verify errors, &c., 349, 350, 360, 369.
- Cesset executio, 309; not necessary to revive judgment by *sci. fa.* after, 600.
- Cessio bonorum, effect of, on privilege from arrest, &c., 71.
- Cestui que trust, security for costs, &c., in action by, 763, 755.
- Challenges, 274. To the array, 292; principal, 292. For favour, 293; extends only to common jury cases, 293. Principal challenge to the polls, 293; *propter honoris respectum*, 293; *propter defec-*



- tum, 293; propter affectum, 294; propter delictum, 295. Challenge to the polls for favour, 295. Challenges where and how to be made, 295; how tried, 296; no challenge allowed on writ of inquiry, 517.
- Chambers, attendance of judges at, 6, 62; may give costs at, 897; justification of bail at, 165, 161, 162.
- Chancery, *see* "*Equity, Court of*;" "*Injunction.*"
- Change, of venue generally, 726, *see* "*Venue*;" of attorney, 36, 37, 151, 163.
- Chaplain of King's Bench prison, 9.
- Charging prisoner with process, 637; with declaration, 638; in execution, 643, 645.
- Charter party, affidavit of debt on, 87; change of venue in action on, 727; interest on judgment on, 355.
- Chattels, bound by delivery of writ to sheriff, 321; seizing in execution, 391, 392.
- Check, when party giving fraudulent one may be arrested a second time, 75.
- Chester, *see* "*Wales*;" direction of writs to sheriffs of, 98.
- Chief justice, when personally concerned in action, proceedings in, 7; teste of writ in name of, 106, 446; when writ of error abates by his death, 334.
- Chirograph of fine, proof by, 231.
- Christian name, *see* "*Names.*"
- Christmas day, when reckoned in proceedings, 58, 160, 197.
- Church, warrant of attorney creating charge on benefice set aside, 496; ejectment for premises to build, damages in, 549.
- Churchwardens, service of declaration in ejectment on, 531; attorney privileged from being, 31; office of, on sequestration, 695.
- Cinque Ports, direction of writs to, 99, 378; error from courts there, 4, 331.
- Circuits, *see* "*Assizes.*"
- Cities, direction of writs into, 97, 98.
- Claim, continual, 529.
- Claim of consuance, 724.
- Claims adverse, proceedings on, 756. *See* "*Interpleader.*"
- Clergyman, privilege of, from arrest, 695; actions and execution against, 695; sequestration, &c., 695, 696; exempt from being juror, 290.
- Clerk, affidavit of debt by, 84; description of, therein, 83; meaning of the term "*clerk*", 834.
- of officers and attorneys, not privileged as their principals, 631.
- of arraigns, proof of indictment by, 230.
- of an attorney, 16—23, *see* "*Attorney*;" acting as principal for attorney, 27; cannot be bail, 32; description of, in affidavit, 83; proof by entries of, 243.
- of the commitments and satisfactions, 9.
- of the common bails, 9.

- Clerk in court, 9, 937; usually employed on attachments, 937.
- of the crown, 9.
  - of the day rules, 9.
  - of the declarations, 9.
  - of the dockets, 9.
  - of the errors, 9.
  - of the estreats, 10.
  - of the grand juries, 10.
  - of the judgments, 10.
  - of nisi prius, 10; sealing and passing record with, 256.
  - of the outlawries, 10.
  - of the papers, 10; when pleas, &c. to be filed with, 208; when to make up paper book, 220, 216, 476, 482.
  - of the papers in King's Bench prison, 10.
  - of the peace, attorney cannot be, 32; proof of proceedings, &c. by, 231.
  - of the postea, 10; marking of postea, 315.
  - of the rules, 10.
  - of the rules on the crown side, 10.
  - of the treasury, 10; entry of roll with, 223.
  - of public company, execution against, 378; service of declaration in ejectment on, 531, 532.
- Client bound by attorney's acts, 27, 28; may change his attorney, when, &c., 36, 37, 151, 163; residence of, &c., 29, 107; releasing debt, &c., 54. *See further "Attorney."*
- Coach proprietors, *see "Carriers."*
- Cognovit, what, 486; by whom given, 486; when several defendants, 487; when more preferable than a warrant of attorney, 486, n.; form of, generally, 487; terms of, should be expressed in, 487; especially in bankruptcy, &c., 487; clause in, not to bring error, 487; not to have supersedeas, 487, 488; form, when given after plea pleaded, 488; for part of cause of action, 488; stamp on, 488; consequences of defective, or want of stamp, 488; attestation to, when defendant in custody, 488; in what cases to be filed, &c., 488, 389; proceedings as to filing, 489; consequences of not filing, 489; judgment on when signed, 489; after death, 489, 490; how to sign it, 490; taxation of costs, 490; how signed, if given after plea pleaded, 490; setting aside execution, when against good faith, &c., 491; excess in execution, scire facias to revive judgment, 491; implied confession of action, what, as on plene administravit, &c., 491; writ of inquiry on, when necessary, 491; entry of judgment in such case, 491; when it discharges sheriff, or bail to sheriff, 428, 132, 144; or bail to action, 428. Execution on judgment on, in cases of bankruptcy or insolvency, 395, 396.
- Cognovit, in ejectment, 542.
- Collectors' books, proof by entries, &c. in, 243.
- Collusion, *see "Fraud."* Between parties to prejudice of attorney, 54;

- when party cannot be arrested after, 78; setting aside judgment in ejectment where collusion against the landlord, 538, 539.
- Commencement of action, writ of *capias* is, 106; commencement of declaration, 189; of issue or paper book, 215.
- Commission day at assizes, when cause must be entered for trial, 266.
- Commission for the examination of witnesses on interrogatories, 250, 252.
- Commissioners, for taking affidavits, 11, 92; for examination of witnesses, 11; for taking bail, 11, 153, 175. Jurat in affidavit taken before, 91, 92.
- Committitur piece, entry of, &c., no longer requisite, 643.
- Commitments, clerk of, 9.
- Common bail, filing of, 453, 454, 721; in ejectment, 537; on removal of cause from inferior court, 721. See "*Appearance*."
- Common bails, clerk of, 9; entering appearance with, 454.
- Common informer, see "*Penal Action*." Corporation cannot be, 620.
- Common paper, gone through in bail court, 59; demurrer set down in, 479.
- Common Pleas, error from the court of, 4.
- Common recovery, how proved, 231.
- Commons, see "*Parliament*;" "*Peers*;" "*Members of Parliament*;" "*Election*."
- Communications between attorney and client privileged, 32; attorney to communicate with client, 39.
- Company, service of declaration in ejectment on bookkeeper, &c., of, 531, 532; execution against clerk of, 378. See "*Partners*."
- Comparison, proof of handwriting by, 242.
- Comperuit ad diem, plea of, 132, 141; need not be signed, 207; proof under, 141.
- Compounding penal actions, 780; in what cases, 780; how and when, 780.
- Compromise, by client to prejudice attorney, 54; when defendant may be arrested a second time after, 75, 76.
- Compulsory clauses of Lords' Act, proceedings under, 654.
- Computation of time, 58; of damages in, see "*Damages*."
- Compute, reference to master, &c., to, 520, 509; and see "*Reference to Master*."
- Concilium, motion for, 366, 370; on demurrer, 478; signing of, a proceeding in a cause to supersede necessity for a term's notice, 227.
- Condition precedent, affidavit of debt must state performance of, 86.
- Conditionally, putting in bail so, 153. Declaring so in bailable cases, 184; abolished in non-bailable cases, 184.
- Confession, judgment by, generally, 486, 489; implied confession of action, 491; writ of inquiry on, 491. See "*Cognovit*."
- Confession of action in ejectment, 542.
- Conscience, Courts of, see "*Court of Conscience*."
- Consent, see "*Agreement*," "*Good Faith*;" clause of, in a submission to arbitration, 908, 909; bringing ejectment against, 544.

- Consent rule in ejectment, 539; production of, at trial, 547.
- Consideration, affidavit of debt on agreement must state a consideration, 86; affidavit to enter up judgment on old warrant of attorney, must state consideration, 498, 500.
- Consolidating actions, in what cases in general, 734; in action on policies, 734; in ejectment, 544, 734; opening consolidation rule, 735; payment into Court on, 735; mode of consolidating, 735; practical directions, 735; proceedings after verdict, 735.
- Conspiracy, jurisdiction of the courts in action of, 2; attorney guilty of, when may be struck off the roll, &c., 42; between parties to defraud attorney, 54.
- Constable, action against, 691; limitation of, 691; demand of warrant, 692; declaration against, 693; venue, 693; plea and other proceedings, 693; damages, 694; costs, 694; attorney privileged from being, 31; exempt from being juror, 290.
- Constable High, proceedings by and against, in action against hundredors, 627.
- Consul, not entitled to privileges of ambassador, 66; affidavit of debt sworn before, 92; certificate of, not evidence, 237.
- Contempt, 136, 930, 931, 933. *See "Attachment."*
- Contingent damages, assessment of, 511.
- Continual claim, 529.
- Continuance, notice of trial by, 226; notice of injury by, 516.
- Continuances, in entry of pleadings in issue generally discontinued, 216; after issue joined by vicecomes non misit breve, 258; where several issues in law and fact, 480, 481; after judgment by default, not necessary, 505, 519; of writs of execution, 375, 600; want of continuances, not assignable for error, 349; plea puis darrein continuance, 283, 286; entry on roll to save statute of limitations, 699.
- Continuing security, judgment, &c., on warrant of attorney, given as, 498, 502.
- Contradictory affidavit of debt not allowed, 94; contradicting party's own witness not allowed, 279.
- Contribution to damages in case of several defendants, &c., 309.
- Consunce, claim of, 724; in what cases, 724; when to be made, 724; how made, 725.
- Conveyancing, bill for, need not be delivered, 46; but may be taxed, when, 49.
- Conviction before a justice, how proved, 230; party convicted of crime cannot make affidavit of debt, 92; of attorney, of a crime, consequences of, 42; of bail, a ground for opposing, 170; persons attainted cannot be jurors, 290.
- Convocation, members of, cannot be holden to bail, 66.
- Coparcener, *see "Jointenant."* *"Partners."*
- Copy, of capias to be served, 109, 120; of summons to be served, 449, 450; of affidavit accompanying notice of bail must purport

- to be a copy, 157; of demurrer books for judges, 478; amendment of copy of writ, not amendable, 837.
- Copies of instruments, *see* "*Evidence*," "*Inspection*;" notice on opposite party to admit copy of public document, record, &c., 228; summons, &c. to admit instrument set forth in pleadings, 238, 769; when parties may be compelled to give them, 245; enactment of 3 & 4 W. 4, c. 42, s. 15, as to, 769; attorney, when lien satisfied, bound to give up, 31.
- Copyhold, not sufficient for bail to justify, 168; proof of surrender, &c. in, 235; relation of judgments as to, 321; extending of, 405.
- Coram nobis, or vobis, error in, 367.
- Cornwall, error from Stannary courts, 331.
- Coroner, direction of writs to, 97; direction of attachment to, 138; award of venire to, where sheriff a party, 210, 217, 258.
- Corporate towns, award of venire in case of, 217.
- Corporations, must sue and appear, &c. by attorney, 620, 33; may arrest defendant, 620; how and in what actions they may sue, 620; need not execute power of attorney, 620; cannot in general sue in assumpsit, 620; must be described in corporate name, 620, 621; suing in name of clerk, 620; process against, 620, 441; to be sued by writ of summons, 620, 621, 441; former process, 620; service of writ on, 450; member of, cannot be holden to bail, 73; cannot be sued in assumpsit, &c., 621; attorney privileged from serving offices of, 31; books of, evidence by, 237.
- Costs, generally.
- At common law, 854; by statute of Gloucester, 854; by statutes 4 Jac. 1, c. 3, 23 Hen. 8, c. 15, 854; omission of in judgment, error, 321; plaintiff may waive them, 319; warrant of attorney to secure future costs, void, 496.
- On verdict for plaintiff*, 854; where plaintiff entitled to damages, in general is so to costs, 854; may be deprived of them by judge's certificate if under 40s., 855; stat. 43 Eliz., c. 6, s. 2, 855; when the judge may so certify, 855; costs in assumpsit and covenant, 855; in debt, 855; in trespass, 856; in trespass where plaintiff recovers less than 40s., 856; stat. 22 & 23 Car. 2, c. 9, 856; to what action of trespass it extends, 856, 857; for assault and battery, 856; for injury to personalty, 856; where title to land in question, 857; where a new assignment, 857; pleas of justification, 857, 858; where judge certifies trespass was wilful, &c., 858; stat. 8 & 9 W. 3, c. 11, 858; trespass by inferior tradesmen, &c., 858; stat. 4 & 5 W. & M. c. 2, s. 10, 858; in case for torts, 858; for slander, 858; stat. 21 Jac. 1, c. 16, 858; in actions on statutes, 859; in actions where plaintiff does not recover sum for which he held defendant to bail, 859; stat. 43 Geo. 3, c. 46, s. 3, 859; what cases within that act, 859, 860; where claim recoverable in court

- of requests, 861, 871; under Welsh judicature act, 861; where cause made a remanet, 861; of a special jury, 260.
- On verdict for defendant*, 861; in general entitled to, if plaintiff would have been, 861; in actions on penal statute, 861; where several defendants, and one acquitted, &c., 861; stat. 3 & 4 W. 4, c. 42, 8 & 9 W. 8, c. 11, 861, 862.
- On nonsuit and nonpros*, 301, 863; stat. 4 Jac. 1, c. 3; 18 El. c. 5, 863.
- On judgment by default*, 505.
- On demurrer*, 481.
- In error*, 333, 356, 361, 367; on bill of exceptions, 300, 863.
- Where there are several issues*, 863; each party will have to pay costs of issues he fails on, 863; instances, &c., 863, 864; where jury discharged, 864; where judgment for plaintiff non obstante veredicto, 864; mode of taxation, 864; of double pleas, &c., 864; stat. 4 & 5 Ann. c. 16, ss. 4, 5, 864.
- Where there are several defendants*, 861, 862.
- On plea in abatement*, 473.
- On feigned issues*, 465.
- In ejectment*, 550, 568.
- In replevin*, 593.
- In scire facias*, 615, 415.
- In actions by and against particular persons*, in actions against hundredors, 628; in proceedings against bail, 170, 415; in actions by or against executors or administrators, 666; in actions by assignees of bankrupt, 684, 688; in actions by or against infants, 675, 677; in actions by paupers, 698; in actions against justices of peace, constables, officers of excise or customs, &c., 694.
- On interlocutory proceedings*, on plea puis darrien continuance, 289, 481; indorsement of, on capias, 108; in action on bail bond, &c., 148; of opposing bail, &c., 170, 171; of unnecessary counts, 189; of witnesses, 248; of interrogatories, 253; of special jury, 260; upon reversing an outlawry, 713; after the removal of causes from inferior Courts, 723; upon the payment of money into Court, 738; when defendant has before offered to pay the debt, &c., 739, 740; upon staying proceedings, 745; upon relief against adverse claims, 760, 761; of particulars of demand, 773; upon setting aside proceedings for irregularity, 785; upon a judgment of nonpros, 792; upon a discontinuance, 793, 794; upon entering a cassetur breve, 796; upon putting off the trial, 800; upon withdrawing record, 273; of the day, 273; on withdrawing jurors, 282; upon judgment as in case of a nonsuit being obtained, 809, 302; for not proceeding to trial, 803; upon entering a nolle prosequi, 813; upon a new trial being granted, 827; upon a venire de novo, 829; on a judgment non obstante veredicto, 830; upon amend-

- ment, 832; upon judgment being arrested, 853; interlocutory costs may be set off against final costs, 867; upon rules absolute or discharged, 885; upon summonses and orders, 897.
- Double and treble costs*, allowed when, 867; how calculated, 867; judge's certificate for, 868; suggestion for, 874.
  - Remedy, &c., for and taxation of costs*, attorney's remedy for costs, 51; his lien for, 53; how far client may compromise, &c., 54; when attorney made to pay costs, 40, 43.
  - Taxation of costs*, 320, 320*a*, 48, 51; increased costs, 316, 320; mode of taxation, 320; notice of taxation, rule to be present at, 320*a*; master sole judge on taxation, 320*a*; attending taxation, waiver of irregularity in payment, 320*a*.
  - Setting-off costs against costs, &c.*, 57, 437, 438.
  - Security for costs*, 762.
  - On arbitrations*, 916, 917. See "*Arbitration*."
- Costs of taxation of attorney's bill**, 51.
- Counsel**, attorney forging signature of, 41; attorney getting himself struck off roll to become one, 44; when pleas, &c. to be signed by, 207; when pleadings in error to be signed by, 348, 351; when replication, &c. to be signed, 212; when demurrer to be signed by, 475; delivery of demurrer book to, 477; order for hearing of, on motions, 60; course as to hearing, &c. at trial, 275; right of speech, 276; in ejectment where several lessors, 547; course as to reply, &c. on trials, 281; course of, on arguing demurrer, 352, 479; when privileged from being held to bail, 68, 114; change of venue in action by or against, 728; mistake of, in not opposing bail, 167; new trial for absence, &c. of, 821; exempt from being jurors, 290; attending by, on executing inquiry, 517; on trial before sheriff, 286*c*; attending by on summonses, &c., 897.
- Counter affidavit of debt**, not allowed, 94.
- Countermand of notice of trial**, 227; the like in trials at bar, 227; of notice of inquiry, 516.
- Counties**, direction of writs and execution in, 97.
- Counties palatine**, for what sum defendant may be held to bail in, 78.
- Affidavit to hold to bail in**, 78. Writs, how directed to them, 98; and how executed there, 98, 111. Rule or order to return writ in, 133; to bring in body, 135. Award of mittimus on issue into, 218; in nisi prius record, 256, 257. No trial at bar in, 269. Error from courts of, 330, 362. Execution from and into, 378. Removal of causes from inferior Courts into, when not allowed, 719.
- Country**, pleading concluding to, need not be signed, 207; notice of trial on pleadings concluding to, 225.
- County court**, attorney practising in, without certificate, 24; bill for business in, must be delivered, 45; proof of proceedings in, 235; proclamations at, towards outlawry, 704, 705.
- Court**, arrest cannot be made in, 119; nor can execution, 382; statement of court, in bail bond, 124.

- Court of King's Bench, jurisdiction of, 1—4; judges of, officers of, 7—16; routine of business of, 58—62.
- Admiralty, proceedings in, proof of, 235.
- baron, rolls of, how proved, 235, 236; inspection of, 236.
- county, *see* "*County Court*."
- ecclesiastical, proceedings in, how proved, 235.
- foreign, *see* "*Foreign Country*."
- inferior, jurisdiction of, in penal actions, 2; former process, &c. as to removing suits from, prevails, 4; removal of causes from, 718, *see* "*Removal of Causes*;" claim of conusance in, 724; attorney practising in, without certificate, 24; attorney of superior court may practise in, 26; attorney practising in name of another, 26; attorney arrested in, 68; error from, 4, 330, 362; proceedings in, how proved, 235.
- leet, when bill for business is taxable, 49.
- of requests, how far attorney subject to jurisdiction of, 32, 632; bill for business in, need not be delivered, &c., 45; costs of actions, which ought to have been commenced in, 872, 753; Court will stay proceedings in, without costs, 753; how to take advantage of the act, depriving plaintiff of costs, 872; suggestion on roll for, 872, 873; plea as to, 872; what causes of action within the act, 873; when case not within it, 872, 874; what persons are within it, 874.
- Covenant, jurisdiction of the court in action of, 2; when arrest allowed in, 81; affidavit of debt on, 87; change of venue in, 727; payment into Court in, 737, 738; staying proceedings on payment of debt in, 748; particulars of demand in, 773; damages in, 307; judgment in, 320; costs in, 855; judgment by default in, is interlocutory, 304; writ of inquiry in, 509; reference to compute in, 509, 520; execution in, 377.
- Coventry, direction of writs to, 98.
- Coverture, *see* "*Husband and Wife*;" plea of, 678, 679, 680.
- Cravingoyer, &c., 765. *See* "*Oyer*."
- Creditors, warrant of attorney to defraud, set aside, 496; proceedings by, against prisoners under Lords' Act, &c., 654, 656. *See* "*Prisoner*."
- Crier of the court, 11; at nisi prius, 11; fee of, on argument of demurrer, 479.
- Crime and criminal cases, attorney may be bail in, 32; attorney, guilty of, court will not interfere against him, 41; when attorney's bill for business in to be delivered, 45; when taxable, 49. Person convicted of, cannot make affidavit of debt, 92; cannot be bail, 170; cannot be jurors, 290; charging prisoner with process in civil action, 637; charging him with declaration, 639; charging him in execution, 643; habeas corpus for those purposes, 638, 643. Habeas corpus to render principal when in custody on a criminal account, 420.
- Criminal conversation, change of venue in action for, 727; damages in, 311; new trial for excessive damages in, 818. \*



- Crops, seizure of, in execution, 392, 393.  
 Cross examination of witness at trial, 280; on interrogatories, 251, 253.  
 Crown, clerk of, 9.  
 Crown side of Court, rules granted on, 881.  
 Curia advisari vult, continuance, &c., of, 476.  
 Cursitors, 14; issuing writ of error, 336, 368.  
 Custody, *see* "Arrest," "Prisoner." Goods, &c. in custody of law not seizable in execution, 392. Render by bail when principal in, 420.  
 Customary of a manor, how proved, 237.  
 Customs and excise, officers of, exempt from being jurors, 290; actions against officers of, 691; limitation of, 691; notice of, &c., 692; venue, 693; plea, &c., 698; tender of amends, 693; damages in, 312, 694; costs, 694.  
 Custos brevium, 11; to set down day of return, &c. of writs, 133.

## D.

- Damages, when defendant cannot be holden to bail in actions for, 78; finding of, on verdict, 302; in what actions, 307; when sole object of action, 307; when nominal only, 307; in case of set-off, 308; where evident plaintiff had sustained some damage, 308; where several defendants, 309; when jury may sever damages, 309, 310; contribution, &c. in case of, 309; where several counts, 309; where a bad count, 309, 310; how cured, 310, 839; measure of damages, 311; in what cases limited, 311; in case of stipulated damages, 311; in case of penalty, 311; in debt for escape, 311; in trover by assignees, 311; in seduction, &c., 311; what may be taken in mitigation, 311, 312; damages in declaration cannot be exceeded, 312; consequences of mistake therein, and how cured, 312, 839; entry of remittitur, &c., 839; new trial in cases of excessive damages, 818; new trial where damages too small, 819; damages subsequent to commencement of action, 312; in ejectment, 549, 567; in sci. fa., 615; to entitle a removal of cause from inferior court, 719; in declaration, &c., after such removal, 723; in actions against excise officers, &c., 312, 694; in actions against justices, &c., 312, 694; double and treble damages, 313; when damages may be increased, 313; when reduced, 313; miscalculation of, will not avoid judgment, 321; consequences of omission of jury to assess damages, 511, 512; remission of, 815, 309, 312; proof of, on execution of inquiry, 517; staying proceedings when under 40s., 752; what damages carry costs, 854—861.  
 Date, mistake in, in attorney's bill, when not material, 47; of writ of capias, 105; of writ of summons, 445; of sci. fa., 610; of writ of inquiry, 508.  
 Day, *see* "Time," day in Court given to defendant, judgment by default for not appearing on, 503.

Day rules, 647.

Days for argument, *see* "*Argument Days*."

De bene esse, declaring so in bailable cases, 184; abolished in non-bailable cases, 184.

De contumace capiendo, prisoner in custody on, not within 48 Geo. 3, c. 123, s. 1, 657.

De melioribus damnis, 309, 847.

De novo, entering demurrer for argument de novo, 479; venire de novo, 828, 264.

De proprietate probanda, writ of, 577, 580.

Death of parties.

What rights of action survive to executors, &c., 600, 601; what rights against them, 600, 601; consequence of death of assignee of bankrupt, 683.

*Before verdict or judgment by default*, 878, 370; when suit abates by, 878; where several plaintiffs or defendants, 878, 217; suggestion on roll, in case of, 871, 878; executor may arrest in second action, 77, 662; attorney undertaking to pay costs must do so, though his client die, 750.

*After verdict, and before final judgment*, 603, 878, 322, 370; suit not abated by, when, 603, 878; death at assizes or sittings, 603; after nonsuit, 603; new trial on, 878; entering up judgment nunc pro tunc on, 603; when a scire facias after is necessary, 603; proceedings on scire facias, 603, 604, 601; death of one of several parties, suggestion of, 878.

*Between interlocutory and final judgment*, 604, 879, 329; suit not abated by, when, 604, 879; form of writ of inquiry, 604; form of judgment, 604; when a scire facias after is necessary, 604, 879; death of one of several parties after, suggestion of, 871, 879.

*After final judgment, and before execution*, 601, 879, 374, 376, 377, 393, 405; suit not abated by, 601, 879; when a scire facias after is necessary to obtain execution, 601, 879; form of scire facias, 601; by and against whom to be brought, 601; scire facias against heir and terretenants, 602; return to, and proceedings on, 602; death of one of several plaintiffs, how execution may be sued out in case of, 604, 871, 879; suggestion after, 604, 871, 879; scire facias in such a case, 871, 879.

*After execution*, death of defendant, 414; of plaintiff, 660.

*After writ of error*, 330, 331, 879; how far it abates it, 333, 879.

*How far a discharge of bail, &c.*, of bail to the sheriff, or sheriff, 145; of bail to the action, 416.

*Other effects of*, how far it revokes attorney's authority, 38; how far a revocation of warrant of attorney, 495; of cognovit, 489, 490; entering judgment on after, 495, 490; of arbitra-

- tor's authority, 910; effect of, in attorney's undertaking, 39; effect of, on his liability, 39; when party may be arrested a second time after, 77; effect of death in ejectment, 551, 552, 556; in replevin, 596; after reference to compute, 521, 879; proof of death by register, 237.
- Death of the chief justice, when writ of error abates by, 334; teste of writ of *capias* in case of, 106; teste of writ of summons, 416.
- Death of the attorney in the cause, 38.
- Death of the attorney, effect of, on clerkship, 19, 20.
- Debt, generally, jurisdiction of the court in action of, 2; arrest for, allowed, 80; indorsement of, on *capias*, 108; on writ of summons, 447; on *distringas*, 460; plea in, when a nullity, 203; or merely informal, 203; change of venue in, 727; payment into Court in, 737; staying proceedings on payment of, &c., 745, 747; damages in, 307; judgment in, final, 504, 505, 510; writ of inquiry in, when necessary or not, 510, 511; costs in, 855, 320; execution in, 377.
- on bond, writ of inquiry, &c., on, 523; suggestion of breaches in, 524; *scire facias* upon judgment in, 527.
- for escape in execution, 412.
- on recognizance of bail, 434. See "*Recognizance*."
- Deceit, see "*Fraud*;" Jurisdiction of the court in actions of, 2.
- Decem tales, 270.
- Declarations, clerk of, 9.
- Declaration, generally.
- When to declare*, 183. Before time for appearance has expired and before appearance, 183; former practice, 183; present practice, 184; cannot declare *de bene esse*, in non-bailable process, 184; where several defendants, 184; between 10th August and 24th October, not allowed, 184; notice to plead in, declaring *de bene esse* on bailable process, 184; when declaration *de bene esse* becomes absolute, 184; optional in plaintiff to declare *de bene esse*, 185; defendant waives irregularity in declaring *de bene esse* by taking declaration out of office, 185; parties may always see exterior of declaration in office, 185. After the time for appearance and before appearance, 185; in bailable cases may declare *de bene esse*, 185; and when, 185. After appearance, 185; should declare absolutely, 185. When plaintiff must declare, 185, 186; further time granted to declare, 187; compelling plaintiff by rule to declare, 187; peremptory rule, 187. In case of several defendants, 187; where several defendants named in writ and you declare against one only, 187. Indorsement on declaration, 188. Declaring by the bye disused, 188. Nonpros for not declaring, 188, 788; must be a four-day previous demand of declaration, 188; nonpros how signed, 791.
- How to declare*, 188; practical directions, 188. In what form,

- 189; on judgment on warrant of attorney, 501; commencement and title, 189; short forms prescribed, 189. Superfluous counts, &c., costs of, 189. How far must correspond with process in number and names of parties, &c., 190. In what cases to be delivered, 191. In what cases to be filed, 191. Notice of filing it, 191; form of, 192; service of, 191; declaration deemed filed only when notice given, 192; if notice irregular judgment signable, 192. Waiver of irregularity in declaring, &c., 192; taking it out of the office, 192; defendant always an opportunity of seeing exterior of declaration in office, 192; his paying for copy, 192. Particulars of demand to be delivered with, 192.
- Subsequent Proceedings, (see the different titles).*
- Amendment of*, 838, 839. *See "Amendment;"* what defects in, aided by verdict, &c., 834, 839.
- Declaration** in ejectment, 529, 558, 561, 564; in replevin, 585; upon a scire facias, 614; against prisoners, 638, 640, 645; in actions by executors, 662; in action against heirs, &c., 669; in actions by infants, 674; in actions by bankrupts, 683; in actions against peers or members of parliament, 618; in actions against justices of the peace, officers of the excise or customs, &c., 693; after outlawry, 709; after removal of cause from inferior court, 723.
- Decree** in equity, how proved, 233.
- Deminus potestatem**, 32; attorney's bill for suing out must be delivered, 45.
- Deed**, *see* "*Debt*," "*Bond*;" affidavit of debt on, 87; damages in action on, 307; how proved, 238; deed enrolled, how proved, 231; not seizable in execution, 392; deeds, writings, &c., in hands of an attorney, how obtained, 30; his lien on them for costs, 53.
- Default**, judgment by, 502. *See "Judgment by Default."*
- Defeazance** on warrant of attorney, 492, &c. *See "Warrant of Attorney."*
- Defect**, *see* "*Irregularity*," *and the different titles.*
- Defence**, *see* "*Plea*," "*Attorney*;" who to begin at trial, 275; reply, 281.
- Degree**, statement of, in affidavit, 83; in writ, 103.
- Delay**, *see* "*Laches*;" when term's notice necessary after, *see* "*Term's Notice*;" obtaining special jury for, 263; writ of error brought for, when no supersedeas, 339, 340.
- Delivery** of attorney's bill, 47.
- Delivery** of declaration, when must be, 191.
- Demand**, on attorney as to writ being issued by him, 29, 447; as to residence, &c. of client, 29, 447; of declaration before nonpros, 188; of a plea, 197, *see* "*Plea*;" of replication not necessary, 212; of rejoinder, &c., when necessary, 213; of number of roll, &c., on nul tiel record pleaded, 482, 485; when necessary before signing judgment on warrant of attorney, 498; when ne-

necessary before execution on, 502; of possession in ejectment on 1 Geo. 4, c. 87, 563; of rent to work a forfeiture, 559, 560; of possession before ejectment, 563; of oyer, 765, *see* "Oyer;" of inspection of instrument, 771; of perusal and copy of a warrant, 692.

**Demand**, particulars of, 773. *See* "*Particulars of Demand.*"

**Demise** in ejectment, 529; mistake in, 529; amendment of, &c., 536.

**Demurrer**—practical directions, &c. as to, 475; where plea answers only part of action, 504; payment into Court, and demurrer to rest not allowed, 738; signature of counsel to, 475; to plea in abatement need not be special, 472; filing or delivery of, 475; amendment of not allowed, 843; plaintiff may add joinder, 475; rule to join in, 475; notice of inquiry on, 475; when an issuable plea within order to plead issuably, 200; in error, 351; demurrer book, how made up, 476; who to make them up, 476; on issues in fact and law when best to argue demurrer first, 477; rule to return it, 477; striking out similiter and demurring, 219, 221, 477; entering demurrer on record, 478; argument, 478; motion for concilium, 478; entering cause for argument, 478; demurrer books for judges, 478; for counsel, 479; days for argument of, 479; common paper or special paper days, 479; amendment after, 479; judgment on, 479; rule for, 479; entering of judgment on roll, 480; in case of several issues, &c. 480, 481; costs on, 481; execution on judgment on, 481.

**Demurrer** in replevin, 590.

**Demurrer Books**, 476. *See* "*Demurrer.*"

**Demurrer** to evidence, 283, 297; in what cases, 297; effect of, 297; practice relating to it, 297; joinder in, 298; argument in, 298; judgment in, 298.

**Deposit** with the sheriff in lieu of bail to him, 126; his payment of, into Court 126; when and how taken out of Court, by defendant, 126; the like by plaintiff, 126; proceedings in the action after it is taken out of Court, 127. Payment of, into Court in lieu of special bail, 180; proceedings on and after, 181, 182.

**Depositions**, in equity, how proved, 233; in Ecclesiastical Court, how proved, 235; in Admiralty Court, how proved, 235; on interrogatories, when allowed and how proved, 250, 253; on former trial, &c., how proved, 234.

**Deputy**—Deputy Marshal of the King's Bench prison, 12. Deputy Crier, 11. Deputy Clerk of the Papers, not allowed, 10. Deputy Sheriff, 14; executing inquiry before, 513; trial of action, not exceeding 20*l.* before, 286 *b.* When affidavit of debt may be sworn before deputy officer, 92. Officer of the sheriff cannot appoint, 112.

**Detainer**, writ of, the process for commencing a bailable action against a prisoner, 4, 636; *see* "*Prisoner, Actions against;*" form of, 636, 637; when defendant may be detained or arrested on illegal detainer, 77, 78, 121; sheriff to search for, before discharging defendant, 121.

- Detinue, when arrest allowed in, 81; damages in, 308; judgment in, 320; execution in, 377.
- Devastavit, arrest of executor, &c., after, 73, 409, 663; its effect upon proceedings against executors, 666, 667, 668.
- Devisee, action against, generally, 672; *see* "*Heir*;" privilege of from arrest, 73; admitted to defend in ejectment, 541.
- Dies amoris, 58.
- Dies non juridicus, *see* "*Holiday*;" bail may be put in on, 152; judgment cannot be signed on, 206, 505.
- Dilatory plea, *see* "*Abatement*;" affidavit to verify, judgment for want of, 205, 471, 472; attorney when not liable for not pleading it, 52; sham plea, when judgment may be signed on, 203.
- Diminution, what, 349; rule for alleging, 347; nonpros after, 347.
- Direction, of writs of *capias*, &c., 97; of summons, 442; of *distringas*, 460; of writs of execution, 378.
- Directory, statute when it is so, 123, 97, 106.
- Disabilities of attorneys, 32.
- Discharge, of defendant improperly arrested, 409; *see* "*Privilege*;" when he cannot be arrested after, 77; of the defendant without bail bond, &c., 127; after authority from plaintiff, 128; effect of, when the defendant is in execution, 128; *fi. fa.* against, before he is charged in execution, 376; of bankrupt from arrest, &c., 688, 689, 70, 116.
- Discharge of judgment, how far execution is, 387, 401, 414.
- Discharged rule, time allowed for, next step after, 143, 152.
- Discharging rule for pleading double, &c., 209.
- Discontinuance—what is, 793; how proceedings continued from term to term, 793; rule to discontinue, 793; when allowed, 793; on what terms, 793; costs on, 793, 794; how and when rule obtained, 794; practical directions, 794; proceedings after, 794; paying the costs, 794; nonpros, 794; entering discontinuance on roll, 795; when rule for discharged, 795; consequences of, 795; new action after, 795; arrest after, 795; in *replevin*, 591; of writ of error, 335; after payment into Court, 743; how far proof of debt a discontinuance of action against bankrupt, &c., 686, 687; when defendant may be held to bail after, 75, 76; formal discontinuance in such case not necessary, 687.
- Discovery, for purpose of defence, 199; *see* "*Injunction*;" inspection of documents, &c., allowed to avoid expense of, 769.
- Disorderly House, compounding action for penalty for keeping of, refused, 780.
- Dissolution of parliament, no abatement of writ of error, 334.
- Distress for rent, how made, 573; on what, 573; where, 573; notice of, 573; when made, 573; removal of goods after, 574, 575; impounding of, 574; appraisalment, 575; sale of, 575; costs of, 576; irregularity in, party not a trespasser *ab initio*,

- 576; tender of amends, 576; goods distrained not seizable in execution, 392; ejectment, where not sufficient distress, 559, 560. *See "Rent."*
- Districts, direction and execution of writs in, 97, 381.
- Distringas, to compel appearance after summons, 456.  
 Statute as to, 456; use of, 457; the writ of summons, 457; what diligence should be used to serve it in order to procure distringas, 457; how distringas obtained, 458, 459; affidavit for, 458, 459; form of distringas, 459; direction of, 460; names of parties, 460; cause of action, 460; how long it remains in force 460; return of, 460; when sheriff to make it, 460; date and teste of, 460; notice attached to, 460; indorsements on, 460; irregularity in, 461; how executed, 461; when and where, 461; entering appearance after, 461; what to be done with the distress and issues, 462; declaration, &c., after, 462.
- Distringas to proceed to outlawry, 703, 704.
- Distringas upon an accedas ad curiam, 582.
- Distringas to compel an appearance in replevin, 582, 583.
- Distringas, jury process, 257, 259; in common jury cases, 259; in special jury cases, 260; in cases of view, 263; alias and pluries, when necessary, 265; when to be resealed, 257, 259; amendment of, 844; defects in, when cured, 845.
- Distringas to compel sheriff to bring in body, obsolete, 135, 136; on former sheriff on writ of execution, 401.
- Dividends of bankrupt's estate, remedy for, 685.
- Dockets, clerk of, 9.
- Docketing entries, 223. Docket paper, 223. Docketing judgment, 321, 323; when necessary, 322, 323, 501. Docketing issue, when not sufficient, 323.
- Doctors exempt from being jurors, 290.
- Domesday book, proof of, 237.
- Doors, breaking open of, in execution of process, 120; on execution of final process, 381; by bail to take principal, 423.
- Double and treble costs, in general, 867; how calculated, 867; in ejectment, 568; in replevin, 953, 594; in action against commissioners of bankrupts, &c., 685; in actions against justices, officers, &c., 694; suggestions, &c. for, 694, 874.
- Double and treble damages, 313.
- Double pleas, &c., 208, 209; rule for, 208; how pleaded, 209; consequences of not having rule for, 209; costs on, Vol. 2.
- Double rent, arrest in action for, allowed, 81; affidavit of debt for, 90.
- Dover, direction of writs into, 99.
- Drafts, *see "Copies."*
- Duration of writ of capias, 106; of summons, 446.
- Durham, *see "Counties Palatine."*
- Duties of attorney, 38, 39, *see "Attorney;"* of sheriff, *see "Sheriff."*

## E.

**Ease and favour, bail bond given for, void, 123, 124; plea of, is issuable, 200.**

**Easter, when court, &c., do not sit during, 7, 58; days in, not reckoned, when, 59; writ returnable in, 59, 104.**

**Ecclesiastical court, proceedings in, how proved, 235.**

**Ejectment, in ordinary cases.**

**Jurisdiction of Court in, 4, 5; proceedings in not affected by 2 W. 4, c. 39, 4, 5; entry on premises, when necessary, 528; notice to quit, when necessary, 529; when party may take possession, &c., without ejectment, 529; the Court exercise an equitable jurisdiction over, 529.**

**Declaration, notice to appear, and service of, 529; form of action, 529; defects in, 529; form of notice to appear, 530; defects in, 530; practical directions, 530, service where several tenants, 531; service on tenant or his wife, 531; on child or servant, 531; on attorney, 531, 533; acknowledgment of receipt before the term, 531, 532; service where regular mode cannot be adopted, 532; motion to Court to make it good service, 532; rule in and service of, 502; where tenant a lunatic, service on clerk of company, 532; service by post, 533; service where tenant absconded, &c., 533; the time of service, 533, 534; service before first day of term suffices, 533; how service to be made, 534; reading and explaining notice, &c., 534.**

**Affidavit of service, &c. 534; by whom to be made, 534; when to be made, 534; form of, 534; where several tenants served, 535; supplemental affidavit, 535.**

**Amending declaration and notice, 535; when allowed, 535, 536.**

**Judgment against the casual ejector, 536; motion for, when to be made, 536; how to be made, 536; rule obtained on, 537; when and how to sign judgment, if no appearance, &c., 537; no occasion for rule to plead, or demand of plea, 537; execution after the judgment, 537.**

**Setting aside judgment, &c. against casual ejector, 538; before writ of possession executed, 538; after a trial lost, 538; where tenant omits to give landlord notice, 538; in cases of collusion, &c., 538.**

**Appearance and plea, &c., by tenant, 538; by whom entered, 538; when to be entered in town causes, 538; in country causes, 539; tenant not compellable to appear, 539; landlord cannot appear in tenant's name without his consent, 539; but tenant must give notice to landlord, 539; consequences of not giving it, 539, 541; tenant cannot defend against landlord's title, &c., 539; mode of appear-**



ing, 539; consent rule, 539; form of, 539; plea of general issue, 540; what other plea allowed, 540; plea of ancient demesne, 540; plea of release, 540; defect in plea, 540; time to plead, 540, 198; plaintiff taking consent rule, and plea from judge's chambers, &c., 541; ruling plaintiff to reply, 541, 545; nonpros, 541, 545; costs of nonpros, 541, 545; issue, 541, 545; judgment where tenant defends for part only, 541.

*Appearance and plea, &c., by landlord and others*, 541; enactment that landlord may defend, 541; may defend with tenant or by himself, 541; who deemed landlords within the enactment, 541, 542; when landlord let in to defend after judgment, 542; where the tenants are paupers, 542; motion for landlord to defend, 542; practical directions, 542; judgment against casual ejector, if landlord defend by himself, 542; motion for leave to sue out execution where landlord does not appear at trial, 542; not necessary where landlord appears, 542.

*Cognovit in*, 542.

*Particulars of premises, &c.*, 543; of breaches of covenant, &c., 543; of residence of lessor, &c., 543.

*Security, &c., for costs*, 543; where lessor an infant, or dead or abroad, &c., 543; compelling real party to pay costs, where defendants paupers, 544.

*Staying proceedings*, on second ejectment, 750, 543; on payment of rent, 543; on payment of mortgage-money, &c., 540, 562, 749; where title of lessor determined after action brought, 544; where demise inserted without consent, 544; where appearance entered without consent, 544, 539; staying proceedings where plaintiff proceeds under 1 W. 4, c. 70, 569.

*Consolidating several ejectments*, 544, 734.

*Replication, &c.*, 545; rule to reply, 545; discontinuance, 545; nonpros and costs, 545.

*Issue, &c.*, 545; form of issue, 545; notice of trial, 546; jury process, 546; nisi prius record, 547.

*Trial, &c.*, 547; only one counsel can be heard, though several lessors, 547; production of consent rule, &c., 547, 548; plea of entry by lessor, puis darrein continuance, 547; costs of day, 547; nonsuit for defendants not appearing and confessing lease, &c., 547; postea in such case, 547; writ of possession in such case, 548; proceeding on consent rule for costs, 548; in ejectment by landlord, plaintiff not to be nonsuited for defendant's not appearing, 548; plaintiff not restrained to quantity of estate, &c. stated in declaration, 549; special verdict, 549; damages in, 549; staying of judgment on security for mesne profits, &c., 549.

*Costs*, 550; when no party appears, only remedy for is by action for mesne profits, 550; where several defendants, 550;

where plaintiff nonsuited, 550; on nonpros, 550, 541; mode of recovery of costs by execution, 550; by attachment, 550; execution for, against casual ejector not necessary, 550; when real party made to pay where a pauper defendant defends, 550; security for costs, 543; where lessor of plaintiff dies, 551; where husband and wife lessors, 551.

*Judgment*, 551; practical directions as to, 551; judgment where judge certifies for immediate execution, 551.

*Error*, 552; proceedings in general as usual, 552; bail in, 552; defendant must have appeared, 552; by whom may be brought, 552; what may be assigned for error, 556; how far a stay of execution, 552; terms imposed before allowing writ of error, 552; rule not to commit waste, 552; bail &c. for mesne profits, &c., 553.

*Execution*, 553; certificate for immediate execution, 553; affidavit for, 553; writs of execution, 554; where plaintiff turned out of possession after writ executed, 554; when must proceed by attachment for costs, 554, 550; when plaintiff must move the Court to take out execution where landlord defends, 554, 542; practical directions as to execution, 554; form of writ, 554, 555; how writ executed, 555; breaking open doors, &c., 555; how possession to be delivered, 555; where too much taken, 555; execution where feme sole defendant marries, 605; poundage, 555; at tortment to lessor of plaintiff, 555; entry, &c. without a writ of possession, 555.

*Restitution*, 556.

*Scire facias*, 556; to revive judgment, &c., 556; after death of parties, 556.

*Action for mesne profits*, 571. See "*Mesne Profits*."

*Ejectment*, upon a vacant possession.

Where entry, &c. allowed without ejectment, 556; what a vacant possession, 556; proceedings in should be more strict than in ordinary cases, 557; entry, lease, ouster, &c., 557; how made, 558; judgment in, 558; practical directions as to, 558; interference by magistrates, 558.

*Ejectment*, for nonpayment of rent.

Where there is a sufficient distress on premises, 559; proceedings at common law to work a forfeiture, 559; seldom adopted, 560.

Where there is not a sufficient distress on premises, 560; enactment of 4 Geo. 2, c. 28, as to, 560; search for distress, 560; declaration and service of, 561; how made, &c., 561; judgment against casual ejector, 561; practical directions as to, 561; appearance and plea, &c., 561; mesne profits, 562, 549, 567; tender of rent, bill in equity, &c., 562, 749.

*Ejectment*, under 1 Geo. 4, c. 87, upon determination of a tenancy.

Enactment of that act, 563; to what cases it extends, 563; land-

lord should be cautious in taking proceedings under, 563; demand of possession, 563; declaration and notice, &c., 564; service of, 564; bail on, 564; proceedings on, 565; recognizance, 565, 566; appearance and plea, 566; practical directions as to, 565; issue, 566; notice of trial, 567; nisi prius record, 567; jury process, 567; trial, 567; plaintiff not to be nonsuit for defendant's not appearing, 567; damages in, 567; stay of judgment, 567, 568; security for mesne profits on, 568; lessor subject to double costs, 568.

Ejectment, by landlord under 1 Will. 4, c. 70, s. 36, 3.

Enactment of that act, 568; extends only to landlords, 569; and to country ejectments, 569; declaration and notice, 569; term of, 569; service of, 569; objection to service cannot be taken at trial, 570; judgment against casual ejector, 570; appearance and plea, &c., 570; notice of trial, 570; proof of, 570; staying proceedings or postponing trial, 570; nisi prius record, 570; rest of proceedings as usual, 570.

Election, see "*Member of Parliament*;" return of writ must be produced to entitle member to be discharged from arrest, 66.

Elegit, 402; what, 402, 403; form of, 403; direction, teste, and return, 403; several writs, 403; when to be sued out, 403, 374; how sued out, 403; how indorsed, 403; when and where executed, 403, 380, 381; how executed, 381, 382, 403; when lands must not be extended, 404; and what lands may be extended, 405; from what time it binds defendant's property, 406, 379; effect of bankruptcy, 688; priority of writs, 406, 379; in case of death of party, 602, 605; when and how returned, 406, 383; poundage and expenses, 406, 385, 386; what writs may issue after it, 406; another elegit, 406; when *fi. fa.* or *ca. sa.*, 406, 407; how defendant to recover back his land, 407; estate of tenant by elegit, 405; his remedy upon eviction, 406.

Elizors, direction of writs to, 97; direction of attachment to, 138; award of venire where sheriff a party, 216, 217, 258.

Elongata, return of, &c., in replevin, 584, 595.

Enlarged rules, 884.

Enlarging time for making award, 914.

Enquiry, writ of, see "*Inquiry, Writ of*."

Enrolment of articles of clerkship, 18; of name of attorney, &c., 22; of deed, &c., after oyer, 767, 768; of deed, how proved, 231, 240.

Entries, in books, &c., 237, 243; docketing of, &c. see "*Docketing Entries*;" of continuances, see "*Continuances*."

Entry of attorney's name in book at King's Bench office, 26; of rule to reply, &c., 211; of pleadings in issue or paper book, 216; of the issue, 221; see "*Issue*."

Entry of the cause for trial, at nisi prius, 265; at bar, 265; at nisi prius in town, 265; at the assizes, 266.

Entry on the roll, of the issue, 221; no longer necessary on moving for judgment as in case of a nonsuit, 808; of demurrer, 478; of proceedings on noli record pleaded, 483, 484; of inquisition, &c., after writ of inquiry, 519, 525; of the judgment, 322, 519; of proceedings upon the record on error, 352; on error from inferior court, 366; on error coram nobis, 372; of execution, 374, 377, 600; of committitur piece, 643; of suggestions, &c., 869; of satisfaction, 437, 659; in debt on bond, 523.

Entry of recognizance to fix bail, &c., 431.

Entry upon lands, in what cases, and when to be made, 528; to avoid a fine, 528; ejectment lies only, where a right of, 529; how made, on vacant possession, 558, 528.

Entry of process on roll to save statute of limitations, 699.

Entry of suggestions on the roll, 869; see "*Suggestions*."

Equity, solicitor in, may practise in courts, &c., 26; proceedings in courts of, how proved, 233; decreeing feigned issue, &c., 463; decreeing special case, &c., 467; relief by, in ejectment for non-payment of rent, &c., 562, 749; injunction by, &c., see "*Injunction*."

Equity of redemption, sale of, under fi. fa., 391.

Erasure in jurat of affidavit, not allowed, 91.

Errors, clerk of the, 9.

Error, generally

*What*, 324.

*In what cases it lies*, 325; only on a judgment or an award in nature of, 325; when certiorari more proper, 325; when court not of record, 325; when writ of false judgment lies, 325; the judgment on which brought must be final, 325; when not, 325; agreement in cognovit not to bring it, 487.

*In what cases granted*, 325; is claimable as of right, 325; except in treason and felony, 325.

*Limitation of*, 325; in cases of infancy, &c., 325; *teste and return*, 326.

*By and against whom to be brought*, 326; only by parties and privies, 326; in case of death, 326; by bail or principal, 327; by party to reverse his own judgment, 327; in case of marriage, 327; in case of several parties, 327; consequences of all not joining, 328; party agreeing not to bring error, 328, 329; to be brought against parties or privies, &c., 329; may be sued out, &c., by different attorney, 392.

*In what court to be brought*, 329; when in same court, 329; as where infant appeared by attorney, 329; where party a married woman, 329; in case of death, 329, 330; in case of removal into King's Bench of another record, 329; no writ of error lies in Exchequer Chamber or House of Lords, for error in fact, 330; if error in judgment and not in process, the

writ cannot be in same court, 330; lies from King's Bench to Exchequer Chamber, 330; and from Exchequer Chamber to House of Lords, 330; when it lies in first instance to House of Lords, 330; when king is a party, 330; in qui tam actions, 330; error from inferior courts, 330, 331; from Common Pleas, 331; from Exchequer of Pleas, 331.  
*When writ amendable*, 331, 849; how, 332, 849; costs on, 332, 850; bail on, 332, 850.

*When writ quashed*, 332; in case of two judgments, 332; when brought against good faith, 332, 487, 492; record remains in superior court, 333; costs on quashing, 333.

*When it abates*, 333; in case of death of parties, 333; on death of chief justice, 334; by act of a party, 334; by marriage, 334; by bankruptcy, 334; prerogation or dissolution of parliament, 334; effect of abatement, 334; when party or representative may sue out a new writ, 334; what to be done with transcript, &c., after abatement, 335.

*When discontinued*, &c., 335.

Error, from King's Bench to Exchequer Chamber.

*In what cases it lies*, 330, 335.

*The writ*, 335; form of, 335; teste and return, 335; must agree with record to be removed, 335, 336.

*How sued out*, 336; practical directions, 336.

*Allowance of it, and how far a supersedeas*, 336; service of note of allowance, 336; form of note of, 336; how far a supersedeas where writ sued out before judgment, 337; how far so when sued out after judgment, 337; when party proceeds to execution at his peril, 338, 339; what steps can or cannot be taken after allowance, 338, 339; proceeding against bail, &c., after, 338; action on judgment, 338; where allowance after execution issued, 339; where error brought for delay, 339; or against good faith, 340; or against a positive agreement, 340; or where bail not put in in time, 340; or where writ returnable before judgment signed, 340; what evidence of error being brought merely for delay, 340; when writ of error abates, how far second writ a supersedeas, 340; writ operates as supersedeas, though defective, 341; not necessary to have sci. fa. on judgment, when execution stayed by, 599.

*Bail in*, 341; when requisite at common law, 341; when by statute, 341, 342; not necessary in judgment, 343; where party plaintiff below and above, 343; in error coram nobis or vobis, 343; in affirmance of judgment, 343; when must be put in, 343; mode of putting in and justifying, 343—346.

*Certifying or transcribing record*, 346; when, 346; how, 346; rule for, 346; transcript money, 346; nonpros for not transcribing, 346; mistake in transcribing, 347; costs,

&c., in nonpros, 347; execution in, 347; proceedings after transcribing, 347.

*Alleging diminution*, 347; rule for, 347; nonpros for not alleging, 347.

*Assignment of errors*, 347; rule for, 347; the assignment, 348; common errors, 348; special errors, 348; several errors, when assignable, 348; what not assignable, 348; assignment for mere delay set aside, 349; where several plaintiffs in error, 349; form of assignment, 349; error in out-branch of record, as where no warrant of attorney, 349; when certiorari necessary, 349; practice as to, 349; writ of, 350; assignment of want of warrant of attorney, when not allowed, 349; want of continuances, 349; notice of assignment to opposite attorney, 350; amendment of, 350.

*Plea, &c., to assignment*, 350; common joinder, 350; when sufficient or not, 350; form of, 350; special plea, when used or not, 351; form of, 351; replication, 351; demurrer, 351; practical directions, 351, 352.

*Argument*, 352; entry of cause for, 352; delivery of paper books to judges, 352; practical directions, 352; course of counsel on argument, 352; judgment on, 353.

*Judgment on, form and nature of*, 353; for defendant in error, 353; for plaintiff in error, 353; judgment cannot be reversed for part, and affirmed for residue, 354; distinctions therein, 354. Writ of inquiry, 353.

*Interest on judgment when allowed, &c.*, 354.

*Costs*, 356; on judgment for defendant below, 356; for plaintiff below, 356; on reversal, 356.

*Signing of judgment*, directions as to, 357.

*Execution in*, 357; directions as to, 357.

*Restitution, &c.*, 357; injunction not to commit waste, 357.

Error, to the House of Lords, after affirmance or reversal in Exchequer Chamber.

In what cases it lies, 357, 358; the writ, 358; how sued out, 358; allowance of it, and how far a supersedeas, 358, *supra*; bail, 358, *supra*; certifying or transcribing the record, 358, *supra*; proceedings after, 359; assignment of errors, 359; practice as to, 359; what may be assigned, 348, 349; form of, 349; certiorari, when requisite, 360; proceedings after assignment, 360; joinder in error, 360; argument, 361; course as to, 361; judgment, &c., 361; remittitur on, 362; costs, 361; execution, 362; restitution, 357, 362, 363.

Error, from inferior court to the court of King's Bench.

In what cases it lies, 330, 331, 362; the writ, 362; teste and return, 362; how sued out, &c., 362; bail, 362; certifying or transcribing the record, &c., 362; scire facias quare executionem non, 363; when to be issued, 363; form of, 363; practical directions as to, 364; judgment of nonpros for not

- assigning errors, 365; assignment of errors, 365; alleging diminution, not allowed, 365; unless in error from county palatine, 365; joinder in error, &c., 349; *scire facias ad audendum errores*, 365; when to be issued, 365; seldom used, 366; plea, &c., 366; entry of the proceedings upon record, 366; argument, 366; course as to, 366; moving for concilium, 366; judgment, 367; interest and costs, 367; execution, &c., 367; restitution, 357.
- Error, to the House of Lords, after judgment of inferior court affirmed or reversed in King's Bench, 367.**
- Error, *coram nobis*.**
- Proceedings to the assignment of errors, 367; in what cases writ lies, 329, 367; to reverse outlawry, 710, 712; the writ, 367, 368; how sued out, 368; bail, 368.
- Proceedings from the assignment of errors to execution, where the errors are matter of law, 369; assignment of errors, 369; plea, &c., 369; entry of the proceedings on record, 370; argument, 370; judgment, &c., 370; execution, 370.
- Proceedings from the assignment of errors to execution, where the errors are matter of fact, 370; assignment of errors, 370; plea, &c., 371; issue, &c., 372; entry of the proceedings upon record, 372; record of *nisi prius*, 372; trial, &c., 372, 373; verdict, 372.
- Error from counties palatine, 331, 362; from the courts in Scotland, 331, 362; from the courts in Ireland, 331, 362; from the Cinque Ports, 331, 362; from the court of Stannaries, in Cornwall, 331, 362; from the courts in London, 331, 362.**
- Error upon judgment in ejectment, 552.**
- Error upon judgment in *scire facias*, 615.**
- Error, reversing outlawry by, 710, 712.**
- Error, writ of *tam quam*, 332, 336.**
- Errors, plea of release of, 351, 352; effect of, in warrant of attorney, 492.**
- Escape on mesne process, what, 128; out of rules of K. B., 647; consequences of it, 128, 129; retaking after, 128; render after, 425; breaking open doors, 120; in case of defendant's illness, 131; action for escape, 127, 128, 129, 633; when and how brought, 127, 129, 633; plea, 634; damages in, 311; sheriff's remedy against defendant after, 129; obstructing sheriff, &c., attachment for, 129; indictment for, 647.**
- Escape on final process, what, 411; out of rules of K. B., 647; retaking after, 411; searching for detainers, 412; demanding production of prisoner, 634; remedy for, 412, 633; plea, 634; change of venue, 728; particulars of demand, 773, 774; amendment in, 838; render after, 425; indictment for, 647; attachment for, 129.**
- Escape, action against marshal for, 633, 647; how to proceed, 633; compelling him to allow inspection of habeas and committitur, &c., 634; demanding production of prisoner, 634; side bar rule**

- to bring defendant into Court, &c. 634; particulars of demand in, 773, 774; amendment in, 838.
- Escheat, lord claiming by, admitted to defend in ejectment, 541.
- Essoign day, how far done away with, &c., 56, 57; statement of defendant's being alive on, in affidavit for judgment on old warrant of attorney, 499; service of declaration in ejectment before it, no longer requisite, 533.
- Estate, what estate may be sold under a fi. fa., 391; of tenant by elegit, 405; his remedy upon eviction, 406.
- Estoppel, from taking advantage of misnomer, 100.
- Estreats, clerk of, 9.
- Eviction of tenant by elegit, 406.
- Evidence, generally.
- Records*, 228; opposite party should be required by notice to admit, 228; otherwise costs of proof not allowed, 228; public statutes, 229; private statutes, 229; records of the King's Courts, 229; when complete, 229; when record itself must be produced, 229; when examined copy, 229; when office copy suffices, 229; verdict how proved, 230; decree in Chancery, 230; proof of trial had, 230; postea, 230; writ, 230; elegit, 230; judgment of House of Lords, 230; convictions before justices, 230; indictments, 230; minute book at sessions, 231; fines, 231; recoveries, 231; deeds enrolled, 231; how to prove examined copy, 231; letters patent, 231; variances in records amendable at nisi prius, 282.
- Matters quasi of record*, 232; opposite party should require admission of, 232, 228; proceedings in parliament, 233; proceedings in Courts of Equity, 233; bill, 233; answer, 233; depositions, 233; decree, 233; will, remaining in court, 234; proceedings in courts of law, not being records, 234. examinations of witnesses, 234; rules, 234; judge's order, 234; affidavits, 234; proceedings before commissioners of bankrupt, 234; proceedings in insolvent court, 235; proceedings in ecclesiastical courts, 235; libel, answer, and depositions, 235; probates of wills, 235; letters of administration, 235; proceedings in admiralty courts, 235; proceedings of inferior courts not of record, 235; of county court, court baron, &c., 235; rolls of such court, 236; award, 236; proceedings in foreign courts, 236; law of foreign country, 236; books, &c. in herald's office, 236; old terriers, surveys, and maps of manors, &c. 237; inquisitions, and public surveys, 237; doomsday book, 237; parish registers, certificates, &c., 237; ship's registers, &c., 237; corporation books, &c. and books of public companies, 237; the pope's bulls and licenses, 238; public acts of state, 238; variances, amendments of, at nisi prius, 282.



*Written instruments of a private nature*, 238; summons should be taken out requiring opposite party to admit, 238; deeds, 238; when must be produced, 238; how production compelled, 238; proof of execution of, how, 239; attesting witness must be called, 239; when dispensed with, 239, 240, 241; wills of lands, 241; mode of proving hand-writing, 242; writings not under seal, 242; when must be produced, 242; when attesting witness must be called, 242; bills of exchange and notes, 242; books of accounts, &c., 243; tradesmen's books, 243; land tax, &c. books, 243. Notice to produce papers, &c., 244; in what cases requisite, 244; time of service of, 244; proceedings on at trial, 245; if not complied with, secondary evidence admitted, 245; mode of compelling opposite party to produce, 245. Variances, amendment of, at trial, 245, 282.

*Parol Evidence and Interrogatories*, 245. Process against witnesses, 245; subpoena, 245; practical directions as to, 246; how and when to be served, 246; subpoena duces tecum, 246; how complied with, 246, 247; habeas corpus, when requisite, &c., 247. Privileges of witnesses from arrest, 247, 115. Penalty for not obeying the subpoena, &c., 247, 248; attachment, 248. Witnesses' expenses, 248; what and when to be tendered, &c., 248, 249. Examination of witnesses upon interrogatories, 249. See "*Interrogatories*."

Evidence, in an action by attorney for costs, 52.

Evidence, upon executing a writ of inquiry, 517, 525.

Evidence, demurrer to, 283, 297. See "*Demurrer to Evidence*."

Examination of attorney before admission, 21.

———— of bail on opposing them, 166.

———— of witnesses, 276—281; the like upon the *voire dire*, 278; of witnesses on interrogatories, 249, 250; of witness at former trial, how proved, 234; privilege from arrest while attending, 114, 116.

    - on interrogatories on attachment, 936; in other cases, 249.

Examined copy, see "*Evidence*."

Examiner, 12.

Excepting to bail, 159; the like in country cases, 177; the like in error, 345; entering and notice of exception, 159, 160; costs after, 157, 158, 174.

Exceptions, making of, in margin of demurrer books, 478.

Exception, day of, 57.

Excessive damages, 311, 312; new trial in case of, 818.

Excessive levy, 491, 501, 502.

Exchequer, error to and from court of, 335, 357. See "*Error, Writ of*."

Excise officers, see "*Customs*."

Exclusive, when time reckoned exclusive, 58. See "*Time*."

Excommunicated person cannot be a juror, 290.

**Execution, writs of, generally.**

*When and by whom to be sued out*, 373; as soon as final judgment signed, 373; where judge certifies for immediate execution, 373; on writs of inquiry, 373; in certain ejectments, 373; on interpleader act, 374; where agreement not to issue, 374; or injunction, 374; pending error, 338; 374; after a year and a day, 374; in case of death, 374, 489, 490, 495; where leave of court necessary, 375; on warrant of attorney, 501; on cognovit, 489, 490; where demand necessary before issuing, 502; in case of several actions on same instrument, &c., 375; by new attorney without changing, 37.

*What writs*, 375; how many running together, 375; executing two at once, 375; where party must wait till return before issuing another, 376.

*Form of, and for what sum*, 376, 501, 502; must agree with judgment, 376, 502; on judgment against several, 376; on death, 377; special execution not warranted by general judgment, 377; amendment of defect, 377; form of writ in different actions, 377; in action against clerk of company, &c., 378; in several actions against several for same debt, 378; on warrant of attorney, 502.

*Direction, teste, and return of*, 378; amendment of, 378, 851.

*Amendment of*, 850, 379, 377.

*From what time it binds defendant's property, and priority of writs*, 379; the judgment, and not the writ, binds lands, 379; chattels bound by the delivery of writ to sheriff, 379; when otherwise, 379; after sale in market overt, 379; on two writs, which should be first executed, 379, 380.

*When, where, and how executed*, 380; any time before return, 380; at night, 380; not on Sunday, 380; on death of parties, 380, 381; sheriff going out of office, 381; where executable, 381; removal of cause from inferior court to have execution, 719; entering and continuing on premises, 381; breaking open doors, 381, 554, 555; execution not vitiated by, 382; palaces, 382; in courts of justice, 382; in the tower, 382; showing warrant, 382; declaring contents of, 382; not to be executed before warrant in officer's hands, 383.

*Sheriff's duty in case of adverse claims*, 756, 383.

*When and how returned, and effect of return*, 383; not usual to return, 383; except elegits, 383; sometimes advisable to compel return, 383; who may compel return, 383; after payment or compromise, 383; where special bailiff executes, 383; where collusion, 383; how to act if improperly ruled to return, 383; when sheriff compellable, though out of office, 383; mode of compelling return, 383, 131—135; attachment for not returning, 384, 131—135; who to make the return, 384, 132; when attorney may make, 384; the different returns, 399, 406, 413; on bailiff of liberty exe-

cuting writ, 384; return of rescue, 384; return made on back of writ, 384; or, if long, in a schedule, 384; filing of return with custos brevium, 384; the general requisites of the return, 384; sheriff to put his name to, &c., 384; in case of new sheriff, 385; if return not sufficient, attachment may issue, 385; formal defect, when and how cured, 385; effect of return, 385; how far conclusive, 385; return prima facie evidence of the facts contained in it, 385; action for false return, 385.

*Poundage and expenses of execution*, 385; at common law, sheriff not entitled to, 385; statutory provisions, 386, 387; amount of, 386, 387; when leviable, 386, 387; expenses of sale by auction, 386; of keeping possession, 386; when no poundage on ca. sa., 387; sheriff's remedy for poundage, &c., 387; party's remedy for extortion, &c., 387.

*How far a discharge of judgment*, 387, 401, 407, 414; death of defendant in, 414; entry of satisfaction on roll, 437.

*Contribution*, 388; action for, 388.

*Irregular execution, and restitution after*, 388; setting aside, 388; application for, 388, 782; restoring goods, &c., 388; restraining bringing action, 388; who may justify under, 388; purchaser gains a title, 388.

*Execution*, by fieri facias, 389; see "*Fieri Facias*."

*Execution*, by elegit, 402; see "*Elegit*."

*Execution*, by levari facias, 408; see "*Levari Facias*."

*Execution*, by capias ad satisfaciendum, 408; see "*Capias ad Satisfaciendum*."

*Execution*, for defendant, 414, 386.

*Execution*, in actions against peers, &c. 618; in actions against corporations, 621; in actions against hundredors, 628; in actions against attornies, 633; in actions against bankrupts, 685, 688, see "*Bankrupt*;" in actions against executors or administrators, 667; in actions against an heir on the bond of his ancestor, 672; in actions against prisoners, 642, see "*Prisoner*;" in actions by and against husband and wife, 679, 680.

*Execution*, in ejectment, 553; in replevin, 594; in scire facias, 616.

*Execution*, upon a judgment of nonpros, 792; upon judgment on a warrant of attorney, 501.

*Execution*, after writ of error determined, 357, 361; after allowance of writ of error, in what cases irregular, 338.

*Execution*, removal of cause from inferior court to have execution, 719.

*Execution*, against bail, 434.

*Execution of a deed*, &c., how proved, 239, 242.

*Executione judicii*, writ de, 363.

*Executors or administrators*,

*Actions by*, 661; what rights of action survive to, 876; may now sue in debt on simple contract, 876; limitation of actions, 661; process, 666; description of plaintiff in, 661, 101,

443; affidavit of debt by, 661, 84; executors holding to bail, without probable cause, within 43 Geo. 3, c. 46, 661; judgment as in case of a nonsuit allowed in, 805; death of plaintiff after arrest, executors may again arrest, 662, 77; not necessary for executor of attorney to deliver bill of costs, 662, 46, 49; declaration by, 662, 101, 190, 443; payment into Court, 662; subsequent proceedings, 662; scire facias to revive judgment, 601 to 604, *see* "*Scire Facias*;" costs, 662; now liable for, as other plaintiffs, 662, 663; security for costs, 663; writ of error by, 326.

*Actions against*, 663; what actions survive against, 876, 877; not within courts of conscience, 663; may be sued in superior court, however trifling the action, 663; attorney, executor, loses his privilege, 663; action not maintainable until proof of will, or acting by him as executor, 663; limitation of actions, 663; process, 663; description of defendant in, 663, 101, 102; cannot in general be held to bail, 663; declaration, 663, 101, 190, 443; plea, 663; amendment of, 841; judgment by default, an acknowledgment of assets, 663, 664; pleading false plea, 664; what pleas need not be signed or filed, 664, 207; judgment of assets in futuro, on plene administravit, &c., 664; when advisable to withdraw pleas, 664; costs of, 664; when and how he may suffer a judgment to another creditor, and defeat plaintiff, 665; when Court will restrain plea of, 200; plea of judgment puis darrein continuance, 665; warrant of attorney by one of several executors, &c., 665, 497, 501; verdict, 665, 287; judgment against, form of in ordinary cases, 665; judgment, on plea of judgment recovered against himself, 665; when liable *de bonis propriis*, conditionally, 665, 666; when so liable absolutely, 666; after interlocutory judgment, writ of inquiry, &c., to be executed, 666; devastavit by its effect, 73. Costs, 666; costs on verdict for defendant, 666; costs on judgment of assets in futuro, 666, 667; costs on pleading a false plea, 667, 664, 666. Execution, 667; *ca. sa.* against, 409, 667; *fieri facias de bonis testatoris*, 667; when a *fieri facias de bonis propriis*, 667, 668; return of devastavit, 667. *Scire fieri* inquiry, 667; costs on, 668.

*Scire facias*, &c., *by or against*, after death of testator, after final judgment, 601, 602, 879; the like after death, between verdict and judgment, 603, 878; the plea after death, between interlocutory and final judgment, 604, 879; the like on death of one of several defendants, &c., 605, 879; probate, when necessary to be taken out before *scire facias*, 601.

*Attachment against*, for non-performance of award, refused, 928. Executor of attorney, need not deliver bill, 46; but bill may be taxed, 49; costs of taxation, 51; lien of, &c., 54.

- Exemplification, proof by, 230, 231.  
 Exeter, direction of writs to, 98.  
 Exigenter, 12, 704; *see* "*Filacer*."  
 Exigi facias, to outlaw a party, 704; proceedings on, 704.  
 Exoneretur, entered on the bail piece, in what cases, &c., 162, 174, 415; mode of obtaining, on render, 424.  
 Expenses, of arrest on *capias*, 111, 112; of witnesses, 248, 249; of execution, 385, 386; *see* "*Poundage*."  
 Explanation of declaration in ejectment, on service of, 534.  
 Extent, bill for business done under, must be delivered, 45.  
 Extortion, of officers of court, 7, 8; attorney sending letter to extort, 41; of sheriff, &c., 128, 387.  
 Extra costs, 318; when recoverable in action for mesne profits, 571; *see* "*Increasing*."

## F.

- False imprisonment, when sheriff, &c. liable to, on arresting privileged persons, 69, 71, 113; on arresting under a misnomer, 101; in case of arrest without warrant, 113; in arresting after an escape, 128; new trial for excessive damages in action for, 818; costs in, 856.  
 False judgment, writ of, 4, 325.  
 False plea, 203; by executor, 664, 666, 668; by heir, &c., 670; *see* "*Sham Plea*."  
 False return, on mesne process, when sheriff liable for, 134; on final process, 380—385, 399, 413; change of venue in action for, 728; *see* "*Escape*."  
 False swearing, *see* "*Perjury*."  
 False verdict, jury when punishable for, 286.  
 Fast day, when reckoned in proceedings, 58.  
 Fees, *see* "*Attorney*," "*Counsel*;" of officers of court, 6, 7, 8; on paying money into Court, 181; of sheriff on arrest on *capias*, 112; on execution, 385, 386, 387; sheriff's remedy for, 387; may detain defendant for, 128; but attorney cannot, 128; allowance to sheriff on deposit of money in lieu of bail, 127; remedy for extortion, 8, 387.  
 Feigned issue, in what cases ordered, 463; to try if warrant of attorney forged, &c., 496; the issue, 464; nisi prius record, 464; trial, 465; *postea*, &c., 465; new trial on, 466; subsequent proceedings, 467.  
 Felony, proceedings against hundredors in case of, 621; staying proceedings pending indictment for, 755; security for costs in action by convicted felon, 763.  
 Feme covert, &c., *see* "*Baron and Feme*;" cannot be holden to bail, when, 71, 72; when discharged from arrest, 72; must appear in person, 33; warrant of attorney by, 495.  
 Fiat of Judge, rules obtained on, 891, 897.  
 Fictitious attestation, proof in case of, 240.

Fictitious bail, *see* "*Bail*."

Fictitious plea, 203; *see* "*Sham Plea*."

Fieri facias, generally, 389, *see* "*Execution*."

*What, and form of*, 389; direction, teste, and return, 389, 378; must pursue judgment, 389, 378; alias and testatum writs, when and how issuable, 389; suing out several together, 390, 375; when second writ not issuable till return day, 390, 376.

*When to be sued out*, 390, 373, 374.

*How sued out, and how indorsed*, 390; practical directions, 390.

*When and where, and how executed*, 389; in general, 380, 381; entering and remaining on premises, 381, 390; when doors may be broken open, 381; showing the warrant, &c., 382; mode of seizure, 390; what a good seizure, 390; how to take care of the goods, 390, 391; rescue, 390; sheriff cannot himself keep the goods, 391; must sell them, 391; mode of sale, 391; selling at less than best price, 391; delaying sale, 391; what may be seized and sold, 391—398; what estates or terms, 391; annuity, 391; fixtures, &c., 391; crops, 392; personal chattels, 392; goods in use, 392; goods pawned or leased, &c., 392; goods in custody of law, 392; goods which cannot be sold, 392; deeds, writings, bank notes, &c., 392; money, 392; goods as to which sheriff has before returned nulla bona, 392; goods on which plaintiff a lien, 392; goods sold or assigned by defendant, 392; where fraudulently, &c., so, 398; goods of woman apparently wife, 393; goods of feme covert, 393; goods of testator, &c., 393; goods of a stranger, 393; sheriff considered a trespasser, 393, 394; when sheriff should impanel a jury, 394; effect of, 394; goods of a bankrupt, 394; after act of bankruptcy, 394; in two months before fiat, 394; on judgment on warrant of attorney or cognovit, 395, 396; goods acquired since bankruptcy, 396; goods of insolvent, 396, 397; how executed in cases of insolvency, 396, 397; goods of partners, 397; how executed in cases of partnership, 397; in case of death, 393, 397, 377; landlord's claim for rent, 397; taxes, 398; poundage and expenses, 386, 398; refunding surplus, 398; purchasers gain indefeasible title, 398; unless writ void, 398; bonds of indemnity to sheriff, 399; tender of debt and costs to sheriff, 399; bound to accept, 399; a trespasser if he does not, 399.

*From what time it binds defendant's property, and priority of writs*, 379, 399.

*When and how returned*, 399; how sheriff may be compelled to return, 383; how return to be made, 384; attorney may return it, 399; when return unnecessary, 399, 383; duty of sheriff on adverse claims, 399; return must be true, 399; effect of return, 399; how far return conclusive, 385, 399; what return should be made, 399, 400.

- Poundage and expenses on*, 385, 386, 400.
- What writs may issue after it*, &c., 400; alias or testatum writs, 400, 375; in case of levy of part, 400, 376; writ of venditioni exponas, 400; when issuable, &c., 400; proceedings on, 400, 401; where sheriff goes out of office, 401; issuing a distringas, 401; elegit, 401; ca. sa., 401.
- How far a discharge of judgment*, 401, 402; when goods to amount of judgment seized, 401, 402.
- Remedy for amount levied*, 402; relief of defendant after seizure, 402; sheriff acquires special property in the goods, 402; summary application for account against sheriff, 402; action against sheriff for account, &c., 402; sheriff may deduct poundage, &c., 402; where special bailiff appointed, 402.
- Contribution*, 388, 402.
- Irregular fi. fa.*, 388, 402, 782.
- Restitution*, 388, 402.
- Fieri facias*, in particular cases, *see the different titles throughout the Index*.
- Fieri facias, de bonis ecclesiasticis*, 695.
- Fieri feci*, return of, 399.
- Figures*, statement in, sufficient, 105, 446.
- Filacer*, 12; what writs he is to sign, 12; proceedings with, on outlawry, 703, 704, 705, &c.
- Filing*, of warrant to prosecute, 35; of affidavit of debt, 82, 94, 109; of affidavits on motions, &c., 882, 884, 905; of bail-piece, 174, 177; of recognizance of bail, 174, 177; of declaration, when must be, 191; of pleas, 207, 208; consequences of not filing, 207, 208, 209; of replication, 207, 208, 212; of demurrer, 475; of cognovit or warrant of attorney in case of bankruptcy, &c. 488, 489, 497; of writ of execution within a year and day, 374.
- Final judgment*, *see "Judgment;"* when considered as signed, 319; after writ of inquiry, 519; of inquisition, defendant a right to have it, 519; of writs of pone, re fa. lo., accedas ad curiam, &c. 581.
- Fine*, for not taking out regularly attorney's certificate, 25; capiatur pro fine, statement of, in judgment, 320.
- Fine of lands*, how proved, 231; entry to avoid, 528.
- Fixtures*, sale &c. of, under fi. fa., 391; under elegit, 404.
- Foreign attachment*, attorney not privileged from, 31; when defendant may be arrested a second time after, 76.
- Foreign country*, *see "Residence;"* laws of, as to arrest, not available here, 68, 71, 76; affidavit of debt on, 85; laws, &c. of, how construed, 68; how proved, 236; affidavit of debt in, 87, 92, 98; statement in such affidavit of value of money, 87; notice of trial in case of defendant's being there, 223; attesting witness residing abroad, proof in case of, 240; examination of witness in, on interrogatories, 250, 252, 254; limitation for writ of error by person in, 325; service of declaration in ejectment,

- where tenant abroad, 532, 533; outlawry of person in, 710; detention of principal in, no ground for enlarging time to render principal, 419; does not discharge bail, 428.
- Foreign courts, proceedings in, how proved, 236.
- Foreign judgment, reference to compute, or writ of inquiry in action on, 510, 511.
- Foreign money, reference to compute or writ of inquiry in action for, 510, 511.
- Foreign proclamations, writ of, 705.
- Foreigner, *see* "*Foreign Country*;" arrest of, 67, 68; description of, in affidavit, 83; jurat in affidavit by, 91; may be rejected as bail, 169; security for costs in action by, 762.
- Forfeiture, ejectment for, 559, 560, *see* "*Ejectment*;" particulars of, 774; of bail-bond, 139, 104; of replevin bond, 595.
- Forgery, by an attorney, how punished, &c., 38, 43; of counsel's signature, 41; when defendant gets discharged from fraud, &c., may be arrested a second time, 75, 76; proof of handwriting by person skilled in detecting forgeries, 242; feigned issue to try if warrant of attorney forged, 496; of process of court, attachment for, 933; of deeds, jurisdiction of the court in action for, 2.
- Forswearing, *see* "*Perjury*."
- Forthwith, meaning of, 211.
- France, *see* "*Foreign Country*."
- Franchise, writ how directed and executed within, 98, 118.
- Fraud, jurisdiction of court in actions for, 2; in procuring admission as attorney, 22, 41; of attorney, when Court will punish him, 42; married woman using, may be holden to bail, 72; in cases of fraud, when defendant may be arrested a second time, 75; in procuring justification of bail, &c., 175; in release by co-plaintiff setting it aside, 286, n. (m); in sale of goods, they may be seized in execution, 379, 392, 393; in action for false return, sheriff cannot impeach judgment on ground of fraud, 399; setting aside warrant of attorney for, 496; defendant not allowed to prove it on execution of writ of inquiry, 518; payment into Court, when estops defendant setting up, 741, 742; new trial on verdict obtained by, 821, 827.
- Frauds, statute of, *see* "*Statute of Frauds*."
- Freehold and freeholder, bail must be freeholder or housekeeper, 166, 168; proof of will, 241; fixtures cannot be taken in execution, 391, 392; county court, &c. cannot proceed in question of, 580.
- Freight, affidavit of debt for, 87.

## G.

- Gaming, arrest in action by loser at, allowed, 81; keeper of gaming-house may be bail, 170; warrant of attorney to secure gambling debt set aside, 496; staying proceedings pending indictment for a cheat, 755.



- Gaol and gaoler, *see* "*Prison of King's Bench*," "*Prison*," "*Prisoner*," "*Turnkey*."
- Gazette, proof of, 238.
- General issue, when and how pleaded, &c., 207, 204; who to begin at trial on, 275.
- General verdict, 302; the like, subject to a special case, 305.
- Gentleman of king's privy chamber, privileged from arrest, 65.
- Gloucester, direction of writs to, 98; statute of Gloucester, 854.
- Good faith, staying proceedings where action against, 754; action on bail-bond, &c., against, set aside, 144, 416; writ of error against, when quashed, or no supersedeas, 332, 340; execution against, 374, 491; on setting aside execution against, Court will not restrain bringing action, 388.
- Good Friday, when reckoned in proceedings, 58, 160, 197.
- Good jury, order for, on writ of inquiry, 514, 525.
- Goods sold, arrest for, 79; not for goods bargained and sold, 79; affidavit of debt for, 84, 88; payment into Court in action for, 741; evidence on writ of inquiry for, 517, 518.
- Grand juries, clerk of the, 10.
- Gratis, rejoining, &c., meaning, &c., of, 201, 213.
- Growing crops, sale, &c. of under *fi. fa.*, 392, 393, *Addenda*; distress on, 573, 574.
- Guarantee, retainer of attorney, what sufficient, 33; given for attorney's bill, bill need not be delivered, 46; arrest on, when allowed, 80; payment into court in action on, admits guarantee, 741.
- Guardian, appointment, &c. of, for infant plaintiff or defendant, 674, 676; liability for costs, &c., 674, 675, 677; cannot be a witness, 675.

## H.

Habeas corpora, on attachment, 138.

Habeas corpus cum causa,

*To receive prisoner into custody of Marshal*, 714; by defendant himself, 714; by plaintiff to declare against him, 714; but this no longer requisite, 714; for bail to render principal, 420, 421, 714; how writ obtained, 715; form of, 715; how executed, 715; commitment on, 715; other proceedings, 716.

*To remove causes from inferior Courts*, 718; when it lies, 718, 719; effect of, 718, 714; form of, 719; how sued out, 720; when and how delivered to judge of inferior courts, 720; how obeyed and returned, 720; bail and appearance on, 720; how bail put in, 721; where several defendants, 721; exception to, 721; notice of justification, 721; justification, 721; liability of bail, 721; filing common bail, in nonbailable actions, 721; proceeding, 722; when granted, 722; how obtained, 722; how sued out, 722; after cause re-

manded, cannot afterwards be removed, before final judgment, 722; proceedings after removal, 722; compelling plaintiff to proceed, 722; declaration, 723; time for pleading, 723; costs, 723.

**Habeas corpus ad respondendum**, to remove prisoner into custody of marshal, 716; to charge defendant with process in civil action, when in custody on criminal account, 638; no longer requisite to charge prisoner with a declaration, 641, 644, 716; form of, 716; how sued out, &c., 716, 715; proceedings on, 716.

———— **ad satisfaciendum**, to charge defendant in execution, 643, 716; form of, 716; how sued out, 715, 716; proceedings on, 716.

———— **ad testificandum**, 247; witness examination act, 251, 253.

Handwriting, how proved, 242.

Habere facias possessionem, 553, 554.

Headborough, *see* "Constable."

Heir,

*Action against*, 669; when liable, 669; how to be sued, 669; process against, 669; pleas, &c., by, 669; parol cannot demur, 669; what pleadable in general, 669, 670; plea of *riens per descent*, need not be signed, 207, 670; confessing action, 670; replication, 670; issue, 671; verdict as to value of lands, 671; judgment when general, 671; when special, 671; execution against, 672; when cannot be arrested on *ca. sa.*, 400.

*Scire facias, &c., against*. *Scire facias* and execution by and against, after death of defendant; after final judgment, 601, 602, 879; the like after death between verdict and judgment, 603, 878; the like after death between interlocutory and final judgment, 604, 879; the like on death of one of several defendants, 603, 879.

*Other matters as to*. Fixtures going to, cannot be sold under *fi. fa.*, 391; writ of error by, 326; admitted to defend in ejectment, 540; not within 1 Geo. 4, c. 87, 563.

Herald's office, books, &c. in, how proved, 236.

Highway, distress for rent cannot be made on, 573.

Hire, affidavit of debt for, 87, 88; sale under *fi. fa.* of goods let, 392.

History, proof of, 238.

Holidays observed by the court, 7; observed by its officers, 7, 8; of master in taxing costs, 13, 318.

Holland, *see* "Foreign Country."

Homage, proof by foreman of jury of, 235.

Houses of parliament, *see* "Members of Parliament," "Peers, &c.;" journals of, how proved, 233; their judgments, how proved, 230.

Housekeeper, bail must be, 166, 168; juror must be, or occupier &c., 291.

**Hundredors, actions against, on riot act, &c., 621; when liable, 621; statutes as to, 621; proceedings against them under the statute, 626; examination before magistrates, 626; limitation of action, 627; process against, 627, 441; service of writ on, 627, 450; cannot be arrested, 73, 409; appearance and defence by high constable, &c., 627; declaration against, 627; judgment by default, 627; plea, 627; amendment, 627; hundredors made witnesses, 627; plaintiff's damage must exceed 30*l.*, 628; costs, 628; execution by *fi. fa.*, &c., 628.**

**Husband and wife.**

*Actions by*, 678; when both ought to join in, 678; when husband may sue alone, &c., 678; consequences of mistake, 678; plea in abatement, &c., 678; in marriage pending suit, 678; *scire facias* on death of feme covert, 605; *scire facias* in case of marriage of, 605, 601; execution on non-suit, 679.

*Actions against*, 679; when to be sued jointly, 679; when not, 679; consequences of mistake in, 679; plea in abatement, &c., 679; process against, 680; arrest of wife, 680, 71; common appearance by husband for wife, 680, 33; service of process on, 680, 450; outlawry, 680; wife sued alone, cannot appear by attorney, 680, 33, 471; execution against, 680; when wife's property may be taken in, 393; *ca. sa.* against husband and wife, 680, 408; death of husband before execution, 680; *ca. sa.* against wife only, if she marry after action brought, 681; *scire facias* on marriage, 605, 601.

*Other matters as to*, writ of error in case of, 327, 329, 368, 370; when writ of error abates by marriage, 334; limitation of writ of error by, 325; warrant of attorney to or by wife, 495, 496, 497; service of declaration in ejectment, 531.

**Hustings, proclamations at, to outlaw a party, 704, 705.**

**I.**

**Idem sonans, sufficient in all cases, 99.**

**Idiots, see "Lunacy;" actions by and against, 690; must sue and defend in person, 33, 691; when may be held to bail, 73; court will not discharge on arrest, 691; bail not discharged by insanity of principal, 428, 690; render of, by bail, 690, 419; service of ejectment, 532; limitation of writ of error by, 325.**

**Ignorance, when attorney liable for, 41.**

**Illegal arrest, 75, 76; when defendant may be detained on, 77.**

**Illegal contract, arrest on, 79; warrant of attorney to secure, set aside, 496; payment into court in action on, &c., 741.**

**Illiterate person, affidavit of debt by, 91.**

**Illness, excuse for attorney not taking out certificate, 25; for not taking defendant to gaol, 131; return of, to *capias*, 134; on *ca. sa.*, 413; time to justify bail, in case of, 153, 171; of witness,**

- interrogatories, &c., 250—253; of juryman, 285; no ground for enlarging time for bail to render principal, 419; of attorney putting off trial for, 798.
- Immaterial issue, consequences, of, 844; repleader on, 844.
- Immediate execution, 317.
- Immorality, warrant of attorney set aside for, 496.
- Impannelling jury, 394, 404; *see* "*Jury*."
- Imparance, abolished in personal actions, commenced by new process, 195, 470; in entry of pleadings, in issue, 216; in ejectments, 545, 546; in *scire facias*, 615; in replevin, 586; when defendant entitled to, 586, 587; consequence of pleading, &c., without, 587, 589; general imparance, 588; special imparance, 588; general special imparance, 588; consequence of imparance improperly obtained, 589.
- Impartial trial, award of venire in local action, in case of, 869, 217; change of venue in case of, 728, 730.
- Imperative, when statute is so, 97, 106, 123.
- Implied confession of action, 491, 503.
- Impounding goods, under *fi. fa.*, 390, 391; under distress, 574.
- Impressment, *see* "*Soldiers*," "*Sailors*."
- Imprisonment, *see* "*False Imprisonment*;" what amounts to arrest, 120.
- Incipitur, entry of issue, &c. on roll, before passing nisi prius record, 221, 256; making incipitur &c., after judgment in nultiel record, &c. 483, 480; incipitur, &c. on judgment on cognovit, 490; on judgment on warrant of attorney, 500; on judgment by default, 505.
- Inclusive, when time reckoned, 58; *see* "*Time*."
- Incompetency of witness, examination of, as to, 278.
- Inconsistent pleas, what not allowed, 209.
- Increasing, damages, 313; costs, 318, 319; affidavit for, 319; given by statute, 315.
- Indemnity, arrest in action on bond of, 80; bail indemnified by attorney, or sheriff's officer, &c. may be rejected, 170; to sheriff on execution, good, 399; signing judgment on warrant of attorney to indemnify, 498; issuing execution on such judgment, 502; reference to compute, &c. in action on bond, &c. of, 510; tender, &c. of, on bringing ejectment without consent of lessor, 544.
- Indemnity acts, as to stamping articles of clerkship, 17; as to not swearing to execution of, 18; as to not enrolling them, 18; as to not taking out attorney's certificate, 25.
- In nullo est erratum, 350.
- India, *see* "*Foreign Country*;" proof of deeds executed in, 241; interrogatories to witnesses in, 254.
- Indictment, *see* "*Venue*," staying proceedings in action pending, 755; court will not interfere against attorney, on grounds

- subjecting him to, 41; for extortion, 8; for a rescue, 130; for escape, 647; proof of, 230.
- Indorsements, on writ of *capias*, 29, 106; on sheriff's warrant on *capias*, 113; on writ of summons, 446; on writ of *distringas*, 460; on *fi. fa.*, 390; on *ca. sa.*, 410; on assignment of bail bond, 140; on declaration, 184, 188.
- Infants.
- Actions by, process*, 673; may be sued out before guardian, &c., appointed, 673; *prochein amy*, &c., 673; infant cannot in general prosecute by attorney, 673; when he may, 673; consequences of so prosecuting, 673; error, &c., 673; mode of appointing *prochein amy* or guardian, 673, 674; removal of, 674; liability for attorney's bill, 674; declaration, &c., 674; commencement of, 674; copy of rule of admission, to be delivered with, 674; parol cannot demur, 675; other proceedings as usual, 675; guardian, &c., not to be a witness, 675; place of residence of *prochein amy*, 675; security for costs, 675; security for, in ejectment, 673; costs, who liable, if defendant entitled to, 675.
- Actions against, process*, 675; arresting, 675, 73; outlawry of, 675; declaration, &c., as usual, 675; appearance, 675, 33, 329; must be by guardian only, 675; not in person, or by attorney, 675; except in ejectment, 675; consequences of, 676; error, &c., 676; setting aside appearance, &c., 676; mode of appearance, 676; special admission to defend, 676; attorney's undertaking to appear, 676, 35; guardian's liability for attorney's bill, 674, 676; plea of infancy, &c., 676; parol cannot demur, 677; what pleas may be pleaded together, &c., 677; counsel's signature, 677, 208; affidavit verifying, 471; *nolle prosequi*, on plea of infancy, 677; replication of necessities, &c., 677; payment into Court, 677; costs, 677; infant liable for, 677; execution, 677; *ca. sa.* against, 677, 408; error by, *prochein amy* should be appointed, 677.
- Other matters as to, infant* cannot be bailiff, 112; limitation for writ of error by, 325; error by, where he appeared by attorney, 329, 676; assignment of, for error, 368, 370, 696; warrant of attorney by infant, 497.
- Inferior courts, *see* "*Courts, Inferior.*"
- Inferior tradesmen, costs in action of trespass against, 858.
- Infirmity, *see* "*Illness.*"
- Informality, *see* "*Irregularity,*" "*Waiver,*" and the various *Titles*.
- Informal plea, 201.
- Infra ætatem*, plea of, need not be signed, &c. 207, 677; *nolle prosequi* on, 677; replication to, 677.
- Initials of defendant, in affidavit of debt, 83; in writ of *capias*, 99; in writ of summons, 442; in declaring, 99, 470.
- Injunction, no ground for sheriff's not obeying body rule, 136;

when ground for setting aside proceedings against sheriff, 144; new rule to plead in case of, 205; supersedes necessity for a term's notice of proceeding, 227; trying cause out of order to avoid, 272; execution after, 374; expenses of keeping goods in execution after, 386; when bail discharged by, 428; replevin bond not forfeited by delay from, 596; when prevents a supersedeas of prisoner, 642; notice of, in such case, 639, 651.

Inquest, *see* "*Inquiry, Writ of*;" upon special *capias utlagatum*, 707; by sheriff, under a *fi. fa.*, 394; the like, under an *elegit*, 404.

Inquiry, writ of, generally.

*What, and form of, &c.*, 508; may be returnable in vacation, 508; may be tested, on day of issuing, 508; staying judgment on, 508; suggestion as to costs after, 509; in case of several defendants, 509; on death of parties, 604, 879, 871; writ of, after judgment in error, &c., 353.

*In what cases necessary, and consequences of want of, &c.*, 509; necessary after interlocutory judgment, 509; when reference to master allowed, instead of, 509; where several counts, 510; where judgment by default as to part, 510; where several defendants, 510; where issues in law and fact, 510; where implied confession of action, 491; in debt not in general necessary, 510; when otherwise, 511; in debt on bond, 511, 522; when the jury at trial act as an inquest, 511; consequences of omission of such a jury to assess damages, 512; want of inquiry, aided by statutes of jeofails, 843.

*Amendment, &c., of*, 843, 513; amendment, &c., where writ lost, 843.

*Award of, on roll*, 512; amendment from, 513; on writ of error, 513.

*How sued out, and left with sheriff*, 513; need not be signed, 513; indorsement on, 513.

*Before whom executed*, 513; when before chief justice, &c., 513; in local action, may be executed in a different county, 513; directions as to executing it before chief justice, 513; directions as to executing it before judge of assize, 514.

*Judge's order for good jury*, 514; costs on, 514.

*Notice of executing, &c.*, 514; to whom to be given, 514; in country cases, 514; where several defendants, 514; when to be given, 514; time for, 514; short notice, 515; term's notice, 515; rules as to notice of trial applicable, 515; on back of paper book, where defendant strikes out similiter, &c., 515; may be given on pleading concluding to country, 515; on back of joinder in demurrer, 516; contents of notice, 516; statement of, time and place of executing, 516; hour of, 516; consequence of mistake in, 516; de-

- fendant's attendance on, 516; continuing and countermanding notice, 516; can be continued but once, 517; costs for not proceeding to execute, 517; irregularity in, waived by defendant's attendance, 517.
- Attending by counsel*, 517; notice of, 517; postponing inquiry for, 517; costs of, in discretion of master, 517.
- Subpoenaing witnesses*, 517, 228, 245.
- How writ executed, and damages on*, 517; summoning jury, 517; attendance on, 517; jurors cannot be challenged, 517; new trial, where undersheriff was party's attorney, 817; proof of damages all that is requisite, 517; no defence to be set up, 517; what evidence sufficient, &c., 517, 518; mitigation of damages, 518; nominal damages, 518; when jury may give more, 518; interest, when allowed, 518, *Addenda*; where several defendants, 518; severing damages, 518; new trial for excessive damages, &c., 818.
- How returned, and form of inquisition, &c.*, 518; in what time defendant may set aside, &c., 518, 519; certificate, &c., of sheriff or judge, to stay execution, 519, 508; form of inquisition, 519; defendant a right to have inquisition filed, 519.
- Final judgment, &c.*, on, 519; mode of signing, 519; rule for, not necessary, 519; form of entry, 519; no continuances requisite, 519; carrying in the roll, 519; death of defendant before final judgment, 520.
- Execution*, same as usual, 520, 373.
- Inquiry, writ of, in debt on bond.*
- In what cases, necessary, 522; defendant accountable only to extent of penalty, 523.
- Proceedings after judgment by default*, 524; suggestion of breaches, 524, 526; before whom to be executed, 523, 524; evidence on, 525; form of the inquisition, 525; subsequent entries, &c., 525; execution on, 526.
- Proceedings after judgment on demurrer, or nul tiel record*, 526.
- Proceedings after issue joined*, 526; suggestion on assignment of breaches on, 526; verdict on, 527; execution on, 527.
- Scire facias, after inquisition or trial, on further breaches*, 527; judgment in, 527; execution on, 527.
- writ of, in replevin, 585, 589, 592.
- writ of, on special capias utlagatum, 707.
- Inquisitions, how proved*, 237; on *fi. fa.*, 394; on *elegit*, 404; filing, &c. of inquisition, 519; *see further*, "*Inquiry*."
- Inrolment, see "Enrolment."*
- Insanity, see "Lunatic;" "Lunacy."*
- Inscriptions on tomb-stones, how proved*, 237.
- Insolvency, a good excuse for, on shewing cause against rule for judgment as in case of a nonsuit*, 808; *stet processus on*, 809.
- Insolvency proceedings, proof of*, 235.
- Insolvent debtors, when cannot be holden to bail*, 71; when bail

- of, discharged, 417; how discharged, &c., under Lords' Act, 653, 654; under 48 Geo. 3, c. 123, *see* "*Prisoner*;" security for costs in action by, 763; *sci. fa.* on judgment against, 607; execution against, &c., 396, 697, 658; filing of warrant of attorney, or *cognovit*, 488, 489, 497; proceedings, how proved, 235; insolvent need not be joined in action, 469.
- Inspection of documents, &c., enactment of 3 & 4 W. 4, c. 42, s. 15, as to, 769; when judge will order an inspection, 769; in policy causes, 769; in other cases, 769; where a discovery necessary, 769; where defendant is possessed of the instrument, 770; compelling marshal to allow inspection of committitur, &c., in action for escape, 634, 770; when sufficient to give extracts only, after order, 771; for getting it stamped, 771; mode of application, &c., 771; inspection of corporation books and public companies, 771, 238; of parish books, 771; of other books not strictly private, 772; of rolls of manor, 236, 770; compelling production of books at trial, 245.
- Inspection of record, prayer of, on plea, &c., of *nul tiel* record, 482.
- Instalments, clause in warrant of attorney to secure, dispensing with *scire facias*, 493; execution on warrant, to secure payment of, 502; bond for payment by, within 8 & 9 W. 3, c. 11, 522; staying proceedings on payment of, in action on bond for, 747.
- Instantan, meaning of, 211, 507.
- Insufficient pledges in *replevin*, action against sheriff for taking, 597.
- Insurance, arrest in action on, 79; compelling production of papers in, 245; change of venue, 728; consolidating several actions on, 734; payment into Court in action on, 737, 741; inspection of documents, &c. in, 769; execution in, after consolidation rule, 375.
- Interest, examination of witnesses as to, 278.
- , when to be given as damages, *see Addenda* upon a judgment in error, 354; recent statute as to, 354; when execution for, on warrant of attorney allowed, 502; reference to master to compute for, 510, 520; payment of, into Court, 739.
- Interlineation, in a jurat of affidavit, not allowed, 91.
- Interlocutory judgment, when it is, 504; on demurrer, 480; on *nul tiel* record, 483; on *cognovit*, 490; on judgment by default, 504; practical directions, 505; writ of inquiry after, 509; death after, 604, 879.
- Interpleader,
- Relief for persons in general*, 756; enactment as to, 756; observations, &c., 757; practical directions, 758.
- Relief for sheriffs and officers executing process against goods*, &c., 759; enactment as to, 759; cases within act, 760; costs on, 761; practical directions, 761, 758.
- Interrogatories, for examination of a witness, when allowed, 249, 250; former practice, 250; how obtained where witness in jurisdiction of court, 250; how obtained if witness out of jurisdiction, 252; costs of, &c. 253; how made evidence at trial, &c., 253; where witness in India or colonies, &c., 254; for



- examination of an insolvent under the Lords' Act, 654; upon an attachment, 935.
- Inventory of distress for rent, 573.
- Ireland, peers of, when privileged from arrest, &c., 65; bankrupt's certificate in, no privilege from arrest, 71; affidavit of debt on judgment of, 87, 92; affidavit of debt sworn there, 92; property in, not sufficient for bail to justify, 168; notice of trial, where defendant resides there, 223; damages in action on, 308; error from courts of, 331.
- Irregularity, setting aside proceedings for,  
*How and when application to be made*, 782; motion to Court, 782; affidavit for, 782, &c.; rule nisi on, 782; how far rule a stay of proceedings, 782; when opposite party should continue taking proceedings, 782; application must be made in a reasonable time, and before opposite party has taken a fresh step, 782; in what time to be made for irregularity in affidavit of debt, 782; in process, 783, 110, 452; in appearance, 783; in declaration, 783; in plea, 783; in plea roll, 784; in issue, 784; in judgment, 784, 506; in scire facias, 784; act of agent waives, 27, 28; there can be no waiver of a nullity, 784; when opposite party may admit, &c., irregularity, and save further costs, 784; notice not to appear, &c., 784, 451; notice not to make rule absolute, &c., 784.
- Costs*, &c., 785; when rule made absolute, 785; when rule discharged, 785; power of judge at chambers to give costs, 785; attachment for, 785; restraining opposite party from bringing action, 785.
- In what cases proceedings set aside for*, 785; where no affidavit of debt, &c., 785, 93; where affidavit defective, 786, 93; in bailable process, 110, 452, 786; in service &c., of writ of summons, 451, 786; in writ of distringas, 461; in declaration, 786, 102; where no notice of trial, 785; in judgment on cognovit without entering appearance, 785; in entering appearance, after limited time, 786; in signing judgment too soon, 786, 202, 315; in execution, 388; setting aside, 388; consequences of, 389; restitution after, 388; in attachment against sheriff, 796, 787.
- Irregular proceedings against sheriff, or bail to sheriff, 142, *see* "*Sheriff, Proceedings against.*"
- Issuable plea, what is, 200; what not, 200, 201, 202; signing judgment for want of, 201; when imposed, on order for particulars, &c., 774.
- Issue or paper book, in general, what, 214.  
*Form of the issue, or paper book*, 214; how intitled, 214, 215; commencement, 215; entry of the pleadings, 216; imparlances or continuances, 216; when several issues in law and fact, 476, 480; conclusion, 216; conclusion on nul tiel record, 482; award of venire facias, 216; where sheriff is interested, 216; in local actions, where partial

trial would be had, 217; where venue laid in city or town corporate, 217; where venue laid in Berwick, &c., 217; where a copy of suggestion should be first given, 217; nient dedire, 217; award of venire in case of death, 217; suggestion of breaches, 218; award of mittimus to a county palatine, 218; rule to return the paper book, 218; when paper book to be returned, 218; consequence of accepting, or not returning, 218; striking out similiter and demurring, 219, 221; notice of trial, 219.

*When and by whom the issue or paper book is to be made up, and when returned, &c.*, 219; when, 219; no time in general limited for, 219; by whom, 219, 220, 476, 482; when to be delivered, and how, 220, 482; before sittings or assizes, 220; issue money, payment of, abolished, 220; where several defendants, 220; variance between issue and pleadings, 220; in such case defendant should not receive, 220; or should compel plaintiff to set it right, 220; second issue, when necessary, 220; the issue remains with the attorney, 220; paper book must be returned, 220; when it must be, 220; consequences of not returning it in time, 220; striking out similiter and demurring, 221; notice of, 220; former practice of striking out pleadings, &c. abolished, 221, 477.

*When and by whom to be entered*, 221; when, 221; incipitur in general only necessary, 221; when defendant may compel entry, 221; how he may, 221; when he may sign nonpros for not entering, 221, 790; further time for entering, 222; where plaintiff's attorney had mislaid papers, 222; form of nonpros for, 222, 791; term's notice, 222; entry not necessary on motion for judgment as in case of nonsuit, 808; by whom issue entered, 222; how entered, 222; practical directions, 222; in case of death, 223; roll, how carried in, &c., 223; practical directions, 223.

*Amendment of*, generally, 843; see "*Amendment.*"

Issue in debt on bond, within 8 & 9 W. 3, c. 11, 526; amendment of, 526.

Issue in ejectment, 545, 566, 569; in replevin, 590; in scire facias, 615; in error coram nobis, 369.

Issue, feigned, 463; see "*Feigned Issue.*"

Issue-money, 220.

Issues from distringas, how disposed of, 462; in replevin, how to proceed as to, 583.

## J.

Jeofails, statutes of, 833, 834, 839, &c.; error lies not for defect cured by, 325.

Joinder, in error, 350, 351; to demurrer, 475, 476.

Joint tenants, &c. service of declaration in ejectment, on, 531; ejectment by one against another, consent rule in, 539; staying proceedings in action after judgment against one of several joint wrong-doers, &c. 752.

Journals of houses of parliament, how proved, 233.

Judges of the court, 5; how long they hold their commissions, 5; they must follow the king, 5; their privileges, 7; cannot be held to bail, 68; exempt from being jurors, 290; may make rules of court, &c., 7; arrangement as to their sittings, &c., 59; their attendance at chambers, 7, 62; their attendance at nisi prius and at assizes, 61; affidavit of debt before, 92; orders of, generally, on summonses, 894, &c., see "*Summonses*;" power to give costs at chambers, 897; order of, to hold to bail, how obtained, &c., '81, 82, 897; testing writs of capias, or summonses, 106, 446; order of, how proved, 234; summing up of judge, 282; executing inquiry generally before, 513; executing inquiry of breaches of bond before, 523; misdirection, &c., of, new trial for, 816, 817; amendment of verdict by notes of, 846.

Judgments, clerk of the, 10.

Judgment, action on, when defendant cannot be held to bail in, 80; affidavit of debt, on Irish judgment, 87, 92; action on, pending error, 338; staying proceedings on payment of real debt on, 747; damages in, 307; writ of inquiry on judgment by default in, 511; costs in action on, 855.

Judgment on verdict, and in general.

*What*, 315; is the sentence of the law pronounced by the court, 315; on verdict for plaintiff, 315; on verdict for defendant, 315; on plea in abatement, 473; as to costs, 315; is an entire thing, and cannot be reversed for part, &c., 354.

*In what time to be signed after a trial at Nisi Prius, when judge does not certify for immediate execution*, 316; formerly rule for judgment necessary, 316; now not so after verdict, nonsuit, or writ of inquiry, 316; time for moving for new trial, 317; or for arresting judgment, 317; party may postpone signing, 317; term's notice, when not necessary before signing, 317.

*In what time to be signed after a trial at Nisi Prius, when judge certifies for immediate execution*, 317; formerly could not have been signed until term, 317; now different where judge certifies, 318; enactment of 1 Will. 4, sess. 2, c. 7, s. 2, 318; may be signed in vacation, &c., 318; staying execution, or setting it aside, 318; rule for judgment, &c., 319.

*In what time to be signed after a trial before the sheriff, &c., under the 3 & 4 W. 4, c. 42*; 319.

*How signed, and costs taxed*, 320; practical directions, 320; entering and marking postea, &c., 320; period when mas-

ter not bound to tax, 320; how master will tax, 320; increased costs, 320; affidavit for, 320; rule to be present at taxation, 320 *a*; notice of taxation, 320 *a*; consequence of not giving, 320 *a*; waiving costs to expedite judgment and execution, 320 *a*; master sole judge as to taxation, 320 *a*; attending taxation, waiver of irregularity in judgment, 320 *a*; when costs taxed, final judgment considered as signed, 320 *a*.

*Form of*, 320 *a*; on verdict for plaintiff, 320 *a*; on verdict for defendant, 320 *b*; in particular actions, 320 *a*; as to costs, 320 *a*; *capiatur pro fine*, *misericordia*, 320 *a*; amercing plaintiff, 320 *a*; omission of *capiatur*, &c. now cured, 320 *a*; miscalculation of damages will not avoid, 321; omission of costs will, 321; marginal statement of day of signing, 321.

*Relation of*, 321; purchasers of lands, &c., 321; when, 321; chattel property, when bound by, 321; suing on judgment, lien thereon not waived, 321.

*When and how entered and docketed*, &c., 321; may sue out execution before entry, &c., 321; when necessary to enter it, &c., 322, 323; in what time, 322; attorney liable for neglecting to enter, 322; opposite party may compel entry, &c., 322; entry, &c. in case of death, 322, 603; docketing issue not enough to bind purchasers, &c., 323; but not necessary to carry in, 323; entering it *nunc pro tunc*, 323, 603; practical directions as to entering, &c., 323.

*When and how registered*, 323; to bind lands in Middlesex or York, 323, 324; practical directions, 324.

*Amendment of*, generally, 324, 848.

Judgment on plea in abatement, &c. 473.

Judgment on demurrer, 480; interlocutory or final, how to proceed on, 480; how entered, &c. 480; costs on, 481; suggesting breaches in debt on bond after, 480.

Judgment on *nul tiel* record, 483, 485; see "*Nul tiel Record*."

Judgment on *cognovit*, 489; how and when signed, 489, 490; see "*Cognovit*."

Judgment on warrant of attorney when signed, 498, 499; how signed, &c. 500, 501; see "*Warrant of Attorney*."

Judgment by default.

*What, and in what cases*, 503; by *nil dicit*, 503; by *non sum informatus*, 503; for want of a plea, 202, 197; see "*Pleas*;" where plea does not answer whole action, 503; cannot be signed till time for pleading expired, 202; for pleading before taking declaration out of office, 205; for pleading before appearance, &c., 205; making default at trial, 504; default as to part of action, 504; where several defendants, 504; for want of rejoinder, &c., 213; for not returning paper book, 218, 219; cannot be signed for not paying for warrant of attorney, 191; when judgment is interlocutory, 504; when final, 504.

- How signed*, 200, 505; defendant must have appeared, 505; how to compel appearance, 505; on judgment for want of a rejoinder, the plea, &c. is struck out, 505; of what term to be signed, 205; may be signed in vacation, 505; but not on dies non, 505; practical directions, 505; no rule for judgment necessary, 505; writ of inquiry, 505; suggestion of breaches, 505; entry of subsequent continuances not necessary, 505.
- Costs on*, 505; where several defendants, 505.
- Execution on*, 505; same as usual, 505; on bankruptcy of defendant, 505, 395.
- Setting aside or waiving judgment*, 506, 507; when judgment irregular, 506, 207; time for applying, 506; attending taxation of costs waives irregularity, 506; Court generally restrain defendant bringing an action, 506; how to waive judgment, 507; setting aside a regular judgment, 507, 207; terms imposed on, 507; costs, 507; affidavit of merits, 507, 206.
- Amendment of*, 848.
- Judgment of nonpros, 788, 791; *see* "Nonpros."
- as in case of a nonsuit, 805; *see* "Nonsuit, Judgment as in case of."
- non obstante veredicto, 829.
- in ejectment, against casual ejector, 536, 566, 570; setting it aside, 538; after verdict, 551, 567.
- in replevin, 584, 589, 590, 591.
- in scire facias, 612, 613; *see* "Scire Facias."
- in actions against prisoners, when to proceed to, &c., 641, 649; *see* "Prisoner."
- in actions against executors or administrators, 665; in actions against heirs on the bond, &c. of their ancestors, 670, 671; in error, 353, 354; upon a demurrer to evidence, 298; de melioribus damnis, 309; upon an attachment, 935; after an award, 929.
- , reviving of, by scire facias, 599, &c.; sci. fa. on, and proceedings thereon, 610, &c.
- , arrest of, motion, &c. for, 852.
- of court baron, how proved, 235.
- Judgment paper, not evidence, 229.
- Judgment recovered, when plea of, not issuable, 200, 203; when plaintiff may sign judgment on, 200, 201, 203; staying action after remedy against one of several wrong-doers, &c. 752; plea of, by executor, puis darrein continuance, &c., 287, 665.
- Jurat of affidavit, 91; must state place of swearing, &c., 91; erasure, &c. in, 91.
- Jurata in nisi prius record, 256.
- Jurisdiction of the Court of King's Bench, in what actions, 1, 2; by what process, 3; as a court of appeal, 4; agreement to refer does not oust courts of, 910.

- Jurisdiction, proceedings upon plea to the, 470; affidavit on plea of nonjoinder of defendant, must state him to be in jurisdiction of court, 469; residence within, to deprive plaintiff of costs under court of requests act, 874; examination of witnesses on interrogatories where he resides out of, 250, 252.
- Jurors, how summoned and returned in common jury cases, 259; in special jury cases, 260, *see* "*Special Jury*;" in cases of views, 263, 274; on venire de novo, 264, 829; how called and sworn, 273, 274; tales, 274; who may be jurors in general, 290, *see* "*Challenges*;" who exempted from serving, 290; qualification of jurors, 291; how punished for non-attendance, 292; they may be discharged before verdict, 282; how they must be kept, and conduct of, during deliberation of verdict, 283, 284; course as to deliberation of verdict, 284; consequence of irregularity in this respect, 285; how to deliver verdict, &c. 285; their verdict, 285, *see* "*Verdict*;" misconduct, &c. of, new trial for, 818, 819, 827.
- Jury de medietate linguæ, 290, 292; de ventre inspiciendo, 290; in trials at bar, 270; when sheriff should impanel, to ascertain owner of goods, 394.
- Jury process, 257; award of an issue, &c. 216, 217; venire, 257, 258; form, &c. of, 258; distringas, 257, 259; form, &c. of, 259; how and by whom sued out, 259; practical directions, 259; when distringas must be resealed, 259; how returned in common jury cases, 259; how in special jury cases, 260; special jury, how struck, 261; costs of it, 260; on views, 263; practical directions as to, 264; venire de novo, 264; when amendable, 844; defects in, when cured by verdict, &c., 845; want of venire, aided by verdict, 845; suing out of, a proceeding in a cause, 227.
- Justices of peace.
- Actions against*, limitation of, 691; notice of action, 691; proof of service of, 693; declaration, 693; venue, 693; plea, 693; tender of amends, &c., 693; damages, 694, 312; certificate of probable cause, 694; double costs, 694; certificate for, 694.
- Other matters as to*. Attorney cannot be a justice, 32; affidavit of debt before, 92; proof of conviction, &c. of, 230; empowered to give possession of premises on vacant possession, &c. 558.
- Justices, attorney may sue out, &c. though not certificated, 24; not within 2 W. 4, c. 39, 457, (n); writ of pone, mode of removing it to superior court, 580.
- Justification of bail, *see* "*Bail*."

## K.

King privileged from arrest, 65; so are servants of, 65; attorney

not privileged from arrest in action at suit of, 69; may privilege a person from arrest, 112; arrest cannot be made in palace, &c. of, 119; writ of error where king is a party, 330; may break open doors in execution for, 382; right of not to be questioned, &c. in county court, &c. 580; not necessary to revive a judgment for, by sci. fa., 599.

King's Bench, court of, *see* "*Court of King's Bench*;" prison of, *see* "*Prison of King's Bench*," "*Prisoner*."

Kingston upon Hull, direction of writs to, 98.

## L.

Labouring jury, new trial in case of, 820.

Laches, when attorney liable for, 38, 41, 42; in ruling sheriff to return writ, 132; to bring in body, 135; in moving for attachment against him, 137, 144; in suing bail to sheriff, 144; in declaring against prisoner, 638, 649; in proceeding to trial or judgment, &c., against prisoner, 641, 649; in proceeding to execution against, 643, 605; when term's notice necessary after, *see* "*Term's Notice*."

Lancaster, *see* "*Counties Palatine*."

Landlord and tenant, *see* "*Rent*," "*Ejectment*," "*Fixtures*;" seizure of crops, &c. under fi. fa. after recovery in ejectment, 393; in other cases, 392.

Lands, how bound by a judgment, 322; by writ of execution, 379; extending of, 404, 405.

Land tax, attorney cannot be commissioner of, 32; proof by entries in books of, 243.

Larceny, attorney convicted of, 43.

Latitat, proceedings by, abolished, 3.

Laws of a foreign country, *see* "*Foreign Country*."

Lease, sale of, under fi. fa. 391; the like of goods leased, 392; extending, &c. an elegit, 404, 405; in ejectment, 539, 557; of property of outlaw after outlawry, 709.

Lessee for life, writ of error by, 327; sale of interest of, under fi. fa., 391.

Letters patent, how proved, 231; scire facias to repeal, 598, 609.

Levari facias generally, 408; how executed, 408; poundage on, 387; why obsolete, 408.

— upon outlawry, 408, 708.

Levy, *see* "*Fieri Facias*," "*Elegit*," "*Execution*;" excessive levy, 491, 501, 502.

Libel, in ecclesiastical Court, how proved, 235; in court of admiralty, how proved, 235; change of venue in action in, 727; putting off trial in case of, 797, 798; *see* "*Case*," "*Slander*."

Liberty, direction and execution of writs in, 98, 118.

Liberum tenementum, plea of, need not be signed, 207.

Lichfield, direction of writs to, 98.

- Lien, of officers of court for fees, 7; of an attorney, 30, 53; of an agent, 28; party having seized same goods in execution, waives lien, 392.
- Limitations, plea of, is issuable, 200; how far payment into court prevents operation of, 742; not pleadable by sheriff in action for account of, 402; entry of process on roll, to save the statute of, 699.
- Limitation, of action in ejectment, 529; in actions against justices of peace, officers of customs and excise, 691; in actions by executors, 661; in actions against, 663; of writs of error, 325.
- Lincoln, direction of writs to, 98.
- Liquidated damages, arrest for, allowed, 80; affidavit of debt for, 86; when must be given by verdict, 311; interest in error on judgment on, 355.
- List of causes for trial, 271, 274; marshal must not insert cause in, when distringas not re-sealed, 259; of special jurors, 261.
- Local actions, award of venire into a different county, 869, 217; change of venue in, 726, 731.
- Lock-up house, 130. *See* "Prison."
- Lodgers, not sufficient bail, 168.
- Log-book, inspection of, refused, 769, 770.
- London, direction of writs to, 98; no trial at bar in, 269; error from the courts of, 4, 331.
- Lords, error to the house of, 330, 357, *see* "Error;" judgment of house of, how proved, 230; journal of, 233.
- Lords' Act, proceedings by and against prisoners under, 653, 654, *see* "Prisoner;" future effects of insolvent liable, 907; sci. fa. to be issued against, 607.
- Loss of trial, what is, &c., 146, 147; proof of lost deed, &c., 238, 242; inspection in case of, 770; amendment of lost postea, 315, 848; amendment of lost judgment roll, 324, 849; reference to compute on lost bill, 521.
- Lots, jury giving verdict by, void, 284; appointing umpire by, is bad, 916.
- Lunacy, attorney's bill for business in, how taxable, 45; excuse for not bringing in body, 136; return of, to capias, 136, 134; witness becoming lunatic, 240; no ground for granting further time to render principal, 419.
- Lunatics, *see* "Idiot." "Lunacy."

## M.

- Magistrate, *see* "Justice of Peace."
- Maintenance, jurisdiction of court in actions for, 2.
- Malicious arrest, costs, &c. in, 859.
- prosecution, proof in action for, 231; new trial, for excessive damages in action for, 818.
- Malicious trespass, costs in action for, 858.
- Malpractice of attorney, 40, 42, 27. *See also* "Fraud," "Negligence."



- Mandamus** for examination of witness on interrogatories, 250, 254.
- Mandavi ballivo**, return of, to mesne process, 134; to final process, 400, 384, 413.
- Manor**, rolls &c. of, proof by, 235, 236.
- Maps** of manors, &c., how proved, 237.
- Marginal notes**, in demurrer books, &c. 478, 479; in judgment, 321.
- Mariners**, *see* "*Sailors*."
- Market overt**, sale of goods in, execution, &c., in case of, 379; 392.
- Marksman**, affidavit of debt by, 91.
- Marriage**, bond for, when defendant may be arrested on, 80; when feme may be holden to bail, 71, 72; discharge of, on arrest, 72; proof of marriage register, 237; when writ of error abates by, 334; warrant of attorney in case of, 495, 497; how far revokes arbitrator's authority, 910. *See* "*Baron and Feme*."
- Marshal** to the chief justice, 12.
- of the King's Bench prison, 12; actions against for escape, &c. 633; process against, 633; proceedings in, 633; amendment in, 634; plea by, 634; inspection of committitur, 634; producing prisoner on demand, 634; non-compliance of, an escape, 634; side bar rule to bring defendant into Court, 634.
- , proceedings against prisoner in custody of, 635. *See* "*Prisoner*."
- Master of the crown office**, 12; notice to, on compounding a penal action, 780.
- of the King's Bench office, 13; appointments by him when to be attended to, 13, 39; taxation of costs by, 318, 319; when not bound to attend, 318, 319; notice of taxation, &c. 319; sole judge of mode of taxing, &c. 319; reference to compute before, 520. *See* "*Reference to compute*."
- Material evidence**, what is within the undertaking to give it, on bringing back venue, 729, 730.
- Members of parliament**, may be rejected as bail, 169; process against, 617; former process, 617, 618, 444; cannot be arrested, 65, 66; discharge, &c. on arrest, 65, 409; cannot be taken in execution, 409, 618; becoming a member when in execution, 618; attachment against, refused, 928; defendant becoming one, bail discharged, 427; proceedings against, when subject to bankrupt laws, 618.
- Memoranda**, to writ of capias, 96, 106; to writ of summons, 446.
- Memorandum**, of warrant to sue, &c. 34, 35.
- at commencement of issue, &c. discontinued, 215.
- Memorial of judgment** &c., registry of, 324.
- Memory**, when witness may refresh, &c., 279.
- Merits**, affidavit of, on setting aside proceedings against sheriff, or bail to sheriff, 147, 148; on setting aside regular judgment, 507.
- Mesne profits**, actions, &c. for, 571; when may be brought, 571; for what, 571; by whom, 571; against whom, 571; to what extent defendant liable, 571; arrest for, not allowed without

- judge's order, 572, 82; pleas in, 572; payment into Court in, 737; security for costs, 572; damages in, 572; action pending error, 572; costs on verdict for less than 40s., 572.
- Middlesex, registry of judgment, to bind lands in, 324.
- Military officers, &c., privilege of, from arrest, &c., 73, 74.
- Militia, attorney not privileged from serving in, 31.
- Minute book of House of Lords, proof by, 230; of parliament, proof by, 233; of proceedings at sessions, proof by, 231; of clerk of peace, 231; minute of verdict by associate, 314.
- Miscasting up of damages, in judgment does not avoid it, 321; in postea, 846.
- Misconduct, of an attorney, how punished, 40, 42; of agent to attorney, 27; of jury, *new* trial, &c. in case of, 819, 820, 827.
- Misdirection of judge, &c. *new* trial for, 816, 827.
- Misericordia, entry of, in judgment, 320.
- Misjoinder of counts, how remedied, 310.●
- Misnomer, in affidavit of debt, 83, 90, 93; in writ, 99, 100, 442; consequences of, in affidavit of debt, 90; in writ, 100, 101, 442; arrest of person by, 113; plea in abatement for, not allowed, 99, 470; summons to amend, 99, 470; execution against by, 409; in commencement of plea, 203; in judgment, &c. on warrant of attorney, 501; in writ of error, 335; *new* trial where a juror sworn by wrong name, &c., 817.
- Misprision of clerks, 34.
- Mistakes, attorney when liable for, 41, 42; when liable for acts of agent, 27. *See* "*Irregularity*," "*Setting aside Proceedings, &c.*"
- Mitigation of damages, what may be taken into consideration in, 312, 394.
- Mittimus to a county palatine, award of, in issue, 218; the like in the nisi prius record, 256; how sued out, &c., 257.
- Mixed actions, court of King's Bench has no jurisdiction in great part of, 1; damages in, 307.
- Money, had and received, when attorney liable for, 53; remedy for, after over-payment of his bill, 50; attorney's bill for money lent, when must be delivered, 45; statement of, in affidavit of debt, 87; affidavit of debt for money lent, paid, or had and received, 88, 89; when a defendant may sue for contribution, 309, 388; when seizable in execution, 392.
- Money, payment of, into court, 736; *see* "*Payment of Money into Court*;" payment of, to sheriff, *see* "*Deposit with Sheriff*."
- Month, calculation of, 48, 58, 132, 199; writ of *capias* remains in force during four calendar months, 106; so writ of summons, 446.
- Mortgage, reference to compute in action on, 509; staying proceedings in bond for, on paying arrears, &c., 747; interest on judgment in error on contract for, 355; sale of equity of redemption on *fi. fa.*, 391; the like of goods, &c. mortgaged, 392; mortgagee admitted to defend in ejectment, 541; stay.

ing ejectment on payment of principal and interest, 749, 543, 562.

Motions and rules, generally, *see* "*Rules and Motions.*"

Multiplicity of actions on bail bond, 141; on recognizance of bail, 434.

Mutiny acts, regulations as to, in actions against soldiers, &c., 75.

Mystery, statement of, in affidavit, 83; in writ, 103, 444.

## N.

Names of parties, statement of, in affidavit to hold to bail, 83; consequences of misnomer in, 90; statement of, in writ, 99, 442; statement of initials, 99, 442; consequences of misnomer in, 100, 101, 442, 443; how misnomer waived, 100, 442; mistatement of, in commencement of plea, does not make it a nullity, 203; statement of, in writ of error, 335.

— of bail in bail piece, 154.

Navy, officers, &c., of, privilege of, from arrest, &c., 73, 74.

Negative of tender in affidavit to hold to bail, 90.

Negligence, attorney's liability for, 41, 42; punishment of, 40, 41; liable for acts of agent, 27; when a defence to his bill, 52; of sheriff in serving writ, 121; in suffering escape, &c., 128, 411, *see* "*Escape*;" change of venue in action for negligence, &c., 727.

Ne recipiatur, 57; to prevent cause being tried, 227, 265; notice of trial after, 228.

Ne unques executor, &c., plea of, need not be signed, &c. 207, 664; consequences of pleading, &c. 664, 666, &c.

Nemo bis vexari pro eâdem causâ, maxim of, 75.

New assignment, 213; costs in case of, 857. *See* "*Replication.*"

Newcastle upon Tyne, direction of writs to, 98.

New rule to plead, 205.

New trial,

*What*, 816.

*In what cases*, 816; where merits not fairly discussed, 816; for misdirection of judge, &c., 816; for admission of improper evidence, 817; for rejection of proper evidence, 817; where bill of exceptions tendered, 817; where under-sheriff attorney for party, 817; where juror sworn by wrong name, 817; where jurors were prisoners, 817; for verdict contrary to evidence, 817, 818; for excessive damages, 818; for smallness of damages, 819; where value in dispute too small, 819; must amount to 20*l.*, 819; after payment into Court, 819; after writ of error, 819; in penal actions, 819; after verdict in abatement, 819; for misconduct of jury, 819; for non-attendance of witness, 820, 821, 822; for perjury &c. of witness, 820; for mistake of, 820; for incompetency of, restored, 820; for labouring, &c. of jury, 820; giv-

ing evidence to them after they have withdrawn, 820; handbills, &c. reflecting on parties, &c., 820; for surprise, 821; variance between issue and record, 821; want of notice of trial, &c. 821; absence of counsel, &c., 821; carelessness of attorney, 821; for want of evidence which might have been adduced, &c., 822; to let in a defence, 822; where special case badly stated, 822; where trial in a wrong county, 822; where jury at second trial find for wrong party, &c., 822; where several issues, 823; in ejectment, 823; in replevin, 823, 593; in issues out of courts of equity, 466; where judge at trial gives leave to move &c., 823, 301; after death of plaintiff after verdict, 828.

*How obtained*, &c., 824; in what court, 824, 466; affidavits for, 824, 825; judge's report, 824; where several defendants, 824; in what time motion to be, 824, 318; cannot be made after limited time, even with consent of parties, 825; after motion in arrest of judgment, 825; after error brought, 825; hearing of rule nisi, 825; after certificate for immediate execution, &c., 826; practical directions, 826; shewing cause against the rule nisi, 826, 824; rule absolute, 827; costs on, 827.

*Costs*, 827; in discretion of court, 827; where misconduct of jury, 827; verdict against law or direction of judge, &c. 827; verdict contrary to evidence, 827; where damages excessive, 827; verdict by trick or surprise, 827; concealing a witness, &c., 827; new trial on a ground not opened at first trial, 827; when rule silent as to costs, 827; where plaintiff discontinues after obtaining a rule, 828; when costs ordered to abide event of second trial, 828; meaning of the terms "event of second trial," 828; double costs, 828; remedy for costs, 828; amendment after, 828.

*The New Trial*, 829; party not bound to proceed to, in a limited time, 829; former nisi prius record will do, 829; practical directions, 829, form of postea, &c. 829; defendant may carry down cause by proviso, &c. 829; parties on second trial confined to same issues raised on first, 826.

Nient dedire, 217.

Night, arrest may be made in, 119; writ of execution may be executed in, 380; writ may be served in, 449.

Nihil, return of, to scire facias, 612, 613, 432, 433; not countenanced, 612, 613; leave necessary to sign judgment on, 613, 614, 433.

Nil capiat per breve, judgment of for defendant on demurrer, 480.

Nil debet, in assumpsit plaintiff may sign judgment, 202; in debt on judgment, &c., 203, 204; how pleaded, &c., 207; damages on, 307.

Nil dicit, judgment by, 503. See "*Judgment by default.*"

Nisi Prius, meaning of, 255, 256, 258; sittings at. 61: clerk of. 10.

Nisi Prius record, generally.

*Form of it, &c.*, 254; first placita, 255; the pleadings, 255; second placita, 255; jurata, 255; sciendum, 256; award of mittimus, where cause is to be tried in county palatine, 256; amendment of, 844, 256; proof by, 230, 52; in town causes, 257; in country causes, 257, 62.

*When and how to be sealed and passed*, 256; where cause stands over from sitting to sitting, 257; copy of particulars to be annexed, 257, 265.

Nisi Prius record, in ejectment, 547, 569, 570.

Nisi Prius record, in error coram nobis, 372; the like, in feigned issues, 464.

Nominal defendant, where party who defends ejectment in name of, made liable to costs, 544, 550.

Nolle prosequi,

*What and general effect of*, 811.

*To the whole declaration*, 811; when may be entered, 811; new action after, 811.

*To some of several counts*, 811; when may be entered, 811; in case of plea, infamy, &c., 811, 677; on plea of bankruptcy, 686; on demurrer to whole declaration, not in general allowed, 812; or on demurrer for misjoinder, 812; on several demurrers, &c. to different counts, 812; on plaintiff's proceeding on a demurrer to part, 812; on reference to compute, 521, 522;

*To a part of a count*, 812; when may be entered, 812.

*To one of several defendants*, 812, 309; in actions on contracts, &c., 812; where defendants plead jointly, 812; where they sever, 812; in actions ex delicto, 812; when jury sever the damages, 813, 309.

*How entered*, 813; form of, 813; amendment, 813.

*Costs on*, 813; on whole declaration, 813, 794; to one of several counts or parts of counts, 813; enactment of, 3 & 4 W. 4, c. 42, s. 83, 813; where entered as to one of several defendants, 813; enactment of sect. 32 of that act, 813, 814.

Non assumpsit, if pleaded in debt plaintiff may sign judgment, 202, 203; how pleaded, &c., 207.

Non-bailable actions, proceedings in, 440. *See "Summons, Writ of."*

Non est factum, when available in action on bail bond, to shew ease and favour, 123; cannot, in such action on such plea, dispute its being brought in proper court, 141; need not be signed, 207.

Non est inventus, return of, on capias, 234; on ca. sa. 409, 413; to writ of distringas, 461, 462.

Non-joinder, plea of, generally, 469; affidavit on, must state defendant's residence, &c. 469; time allowed to plead it, 470; plaintiff may reply bankruptcy, &c. 470; on subsequent action after plea of, plaintiff may have verdict against one defendant, 469.

Non obstante veredicto, judgment of, 829.

Non omittas clause in writs, use of, 98; in fi. fa. 389; in ca. sa. 409.

## Nonpros,

*What*, 788.

*For not declaring*, 788, 186; in what time plaintiff must declare, 185; demand of declaration before signing judgment, 788; where several defendants, 788; must be signed within a year, 788; in outlawry, 788; in replevin, 789, 584, 589; on removal of cause from inferior court, 723, 789; defendant must appear to action before signing judgment, 789; when he may so appear, 789.

*For not replying*, &c., 789, 214, 472; time limited for replying, &c., 211, 789; demand of replication, &c. not requisite, 789; may be signed as to part of suit, 789; in replevin, 790, 589; in ejectment, 541, 545.

*For not entering the issue*, &c., 790, 221; time for entering, 221, 222, 790; when judgment may be signed for, 790.

*In error*, 790; for not transcribing, 346; for not alleging diminution, &c., 649; for not returning certiorari, &c., 349; for not assigning errors, 350.

*In other cases*, 791; after stay of proceedings, or order for particulars, 775, 791; on second action, 791; on rule to discontinue, &c., 791, 794.

*How signed*, 791.

*Setting aside judgment of*, 791; where judgment regular, 791; in action by common informer, 791; where judgment irregular, 791.

*Costs and execution*, 792; when plaintiff not liable to, 792; form of execution for, 792; poundage, &c. not leviable, 792.

*New action after*, 792; may be brought, 792; when defendant cannot be held to bail in, 792, 75, 375.

Non sum informatus, judgment by, 503; see "*Judgment by default*."

Nonsuit, 283, 300; effect of, 300; optional in plaintiff to submit to, 300; in what cases, 300; in undefended cause, 301; where several issues, and a point reserved, 301; after judgment by default by one of several defendants, 301; after a tender, 301; after payment into court, 301, 742; on trial by proviso, 301; how recorded, 301; costs on, 301; judgment of, for not declaring, 301; in what cases set aside, 301; death of party after and before judgment abates suit, 603; costs, &c. on, 302; error on, 325, 340; a second time after, 75; proof of, 230.

— in ejectment, 547, 567.

— in replevin, 592.

— in sci. fa. 615.

Nonsuit, judgment as in case of,

*In what cases*, 805, 301; enactment of 14 G. 2, c. 17, as to, 805; where plaintiff neglects to bring on cause to trial, 805; to what cases the act does not extend, 805; where plaintiff once takes down cause to trial, 805; in remanet cases, 805, 806; where cause delayed by course of business of the

Court, 806; in special jury cause, 806; on death of one of several plaintiffs, &c., 806.

*When and how obtained*, 806; when motion for, to be made, 806; in town causes, 807; in country causes, 807; motion cannot be made after motion for costs for not proceeding to trial, 807; affidavit on motion, 807; practical directions, 807; notice of motion, 808; term's notice not necessary, 808; entry of issue not requisite, 808; in what cases Court will allow further time for trial, 808; absence of witness or evidence, &c., 808; insolvency of defendant, &c., 808; stet process, 809; discharging of rule for, on peremptory undertaking, &c., 809; costs on, 809; making rule absolute, 809; proceedings after peremptory undertaking, 809; fresh notice of trial after, 809; course of proceeding if plaintiff neglects to try, 809; discharging rule for peremptory undertaking, 809, 810.

Norwich, direction of writs to, 98.

Not guilty, when plea of, a nullity. 203.

Note of allowance of writ of error, 336.

Notice in general, service of, 25, 28, 29, 155, 156; on agents, 27; service on attorney, where, &c., 28; time of service, 29.

—— of action, 691.

—— of application for admission as attorney, 20.

—— of attorney's lien, 54.

—— to plead, 193; *see* "*Plea*."

—— of striking out similiter and demurring, 251.

—— of bail, 154; the like in country cases, 177; the like in error, 344; opposing bail for, defect in, 167.

—— of exception to bail, 160.

—— of justification, 162; the like in country cases, 178; \*opposing bail for defect in, 167.

—— of time to inquire after bail, 173.

—— of render by bail, 423.

—— of scire facias, 612, 613, 433.

—— of filing declaration, 191, 192.

—— of levy under a distringas, in non-bailable actions, 459.

—— of filing plea, 211.

—— of set-off, in what cases, and how, 207; on whom served, 27; amendment of, 843.

—— of intention to dispute bankruptcy, 207, 684, 686; amendment of, 843.

—— of inquiry, 514, 213; on back of joinder in demurrer, 475.

—— of attending inquiry by counsel, 517.

—— of motion, generally, 883.

—— to admit judgment, &c., or record, 228.

—— to produce papers, &c., effect of, 239, 241; when necessary, &c., 241, 244; not necessary to produce bill of attorney, 52.

—— of trial, 219, 514, 515; *see* "*Trial*."

—— of countermand, 201.

Notice, term's, *see* "*Term's Notice.*"

—— of trial, in trials at bar, 269.

—— of trial before sheriff, 286 c.

—— of trial to prisoners, 642.

—— of trial in ejectment, under 1 Will. 4, c. 70, 569

—— of motion to put off trial, 799.

—— of taxation of costs, 320.

—— of waiver of judgment by default, 507.

—— of motion for judgment as in case of a nonsuit, 808.

—— of motion for interest on judgment in error, 354.

—— to quit, in what cases necessary, 529; proof of, 242.

—— to compute principal and interest, &c., 521.

—— to appear in ejectment, 529, 564, 569.

—— of distress, &c. for rent, 573, 574.

—— to marshal, &c. of grounds for preventing supersedeas of prisoner, 639, 651.

—— by prisoner under compulsive clauses of Lords' Act, 654.

—— by prisoner, &c. under 48 Geo. 3, c. 123, s. 1, 656, 658.

—— of action against justices, officers, &c., 691, 692.

Nottingham, direction of writs to, 98.

Novel disseisin, writ of, 406.

Nuisance, view in action for, 264.

Nul tiel record, plea of, need not be signed, 207; issue &c. on, when record of another Court pleaded, 482; when record of same Court pleaded, 485; how made up, 482; demanding note, &c. of record, 482, 485; rule to produce record, 483; certiorari where record of another court pleaded, 485; entry of proceedings on, 483, 484; trial, &c. on issue on, 483; evidence on, 229; judgment on, 483, 484; interlocutory judgment, 483; final judgment, 483; proceedings on judgment, 483; rule for, 483; execution on, 484.

Nulla bona, return of, to fi. fa., 389, 399, *see* "*Fi. Fa.;*" to writ of distringas, 461, 462.

Nullity, distinction between null and irregular process, 110, 111; distinction between nullity and irregularity in pleading, 201; when plaintiff may treat plea as, 194, 200, 201, 205; when he may treat a plea in abatement as, 472; if defendant's plea, &c. nullity, he cannot sign judgment for want of replication, &c., 214, 472.

Number of parties in affidavit of debt, 90; in writ, 102.

Nunc pro tunc, entering of judgment, 603, 323.

## O.

Oath, *see* "*Affidavit;*" of attorney before admission, 22.

Obstructing the sheriff in the execution of his office, *see* "*Rescue,*" "*Escape.*"

Octo tales, 270.



- Office copy, 229; *see* "*Evidence*."
- Officers of court, 6—55; their privileges, 7, 8; exempt from being jurors, 290; holidays kept by, 7, 8; their fees, 7, 8; attachment for not paying, 933; extortion, &c. by, 8; actions by and against generally, 629, 631; *see* "*Attornies*."
- Officer of sheriff, 112; *see* "*Sheriff*;" what to pay when sheriff fixed, 148; how reimbursed, 149; may be rejected as bail, 170; privileged from being juror, 290.
- Officers of the Tower, &c. when privileged from arrest, 65.
- Officers of army and navy, when may be arrested, 72, 74; exempt from being jurors, 290.
- Officers of excise and customs, *see* "*Customs*."
- Offices, privilege of attorney, &c. from serving, 31, 290.
- Omittas, *see* "*Non Omittas*."
- Opening rules, 886.
- Opinion of counsel, attorney acting under, when not liable for ignorance, 42; of witness, when admissible, 279.
- Opposing bail, 166; costs of, 170.
- Order upon summons, *see* "*Summons and Orders*."
- Original bill and summons abolished, 3.
- Original writ, proceedings by, abolished, 3; except in ejectment, &c., 4; to be signed by cursitor, 14; declaration in ejectment, &c. not to recite, 529; proceedings by in ejectment, *see* "*Ejectment*;" omission of words, "wheresoever, &c." in proceeding by, not material, 530; issue and imparlances in, 545, 546; amendment of, 835.
- Ouster in ejectment, 539, 557.
- Outlawries, clerk of the, 10, 12.
- Outlawry,  
*Upon mesne process*, 702; what, 702; effect of, 702; outlaw cannot be juror, 290; may be rejected as bail, 170; and in what cases, 702; against whom, 702; writ and process for, 702; practical directions as to, 703, 704; *exigi facias*, &c., 704; writ of proclamations, 704; writ of foreign proclamations, 705; how &c., these writs executed, 705; *allocatur exigent*, 705; exacting defendant, 705; appearance &c., in non-bailable actions, 705; supersedeas on, 706; bail in bailable cases, 706; when outlawry deemed complete, 706; *capias utlagatum* against the person, &c., 706; proceedings on, 706; arrest on, 706; sheriff's duty on, 706; bail on, 706, 707; arrest of a bankrupt on, 707; special *capias utlagatum* against the goods, &c., 707; proceedings on, 707; obtaining satisfaction out of the property seized, 708; practical directions as to, 708; lease of property from the king, &c., 709; declaration after outlawry, 709; proceedings as to, 709.
- Upon final process*, 710; proceedings as to, 710; no writ of proclamations necessary, 710; arrest of defendant under, 710; outlawry after error brought, 710.

*Reversal, &c., of*, 710; either by pardon, writ of error, or by motion, 710; grounds for reversing, 710, 711; cannot be reversed by third persons, when, 710; reversal on motion, 711; proceedings on, 711; in nonbailable actions, 711; in bailable actions, 712; supersedeas, 712; on outlawry after judgment, 712; reversal by writ of error, 712; proceedings on, 712, 713; seldom adopted, 713; sometimes advisable, 713; costs, 713.

Overplus, in execution, in ejectment, 555; under distress for rent, 575.

Overseer, attorney privileged from being, 31. *See* "Churchwarden."

Oyer of deeds, &c.; in what cases, 765; when demandable, 766; by whom, 766; how, 766; when and how granted, 766; time to plead after, 766, 195; refusal of oyer, 767; proceedings after oyer, 767; consequences of not properly setting forth deed on, 767; defendant's not setting forth whole deed, &c. 768.

## P.

Palace, arrest cannot be made in, 119; nor can execution, 382.

—— court, arrest under process of, 119, 120; removal of cause from, 720, &c. *See* "Removal of Causes."

Palatine, county of, *see* "Counties Palatine."

Papers, clerk of the, 10.

Paper book, 214. *See* "Issue." *Addenda*, reg. 5.

Paper books for the judges, on argument of error, 352, 366; on demurrer, 476. *See Addenda*, reg. 7, 14, 15.

Paper days, 59, 60.

Parish register, how proved, 237.

Parish relief, party receiving, cannot justify as bail, 168.

Parliament, members of, cannot be arrested, &c., 66; how discharged on arrest, 66; bail of, discharged, 427; proof of proceedings in, 230, 233; dissolution or prorogation of, no abatement of writ of error, 334; bill for business in, when taxable, 49.

Parochial relief, receiving of, ground for rejecting bail, 168.

Parol, demurring not allowed, 669.

Parol evidence, 238, 239, 242.

Part of cause of action, cognovit for, 488; part of warrant of attorney bad, 497; plea answering only part, judgment or demurrer on, 503, 504; nonpros to part of suit, 789.

Particulars of demand,

*In what cases*, 773; when should be annexed to declaration, 773, 192; consequences of not annexing them, 773, 192; in what cases delivery of may be compelled, 773; in debt on bond, 773; in covenant, 773; in action by vendee against vendor, 773; in actions for torts, 773; in trespass, 774; in ejectment, 774, 543.

*How obtained and proceedings before delivering*, 774; judge's

order for, 774; at what time, 774: terms imposed on, 774; pleading issuably, &c., 774, 200; how far order a stay of proceedings, 774; when defendant may sign judgment of nonpros after, 775.

*Form of, and proceedings subsequent to delivery*, 775; when particulars cannot be comprised in three folios, 775; general rule as to the form, 775; statement of credit side of account, 775; a particular as general as declaration, a contempt of order, 775; referring to account delivered, 776; delivery of, 776; order, &c., for better particulars, 776; amendment of, 776, 841; time to plead after particulars, 776, 195; where order for particulars and order for time to plead, 776; annexing of particulars to Nisi Prius record, 776, 257, 265; effect of such annexing, 776; how far plaintiff will be confined to his particulars at the trial, 777; what a variance from particulars and proof of, 777, 778; proof at trial of delivery of particulars, 779.

Particulars of premises or breaches, &c., in ejectment, 543.

Particulars of set-off, 774; how obtained, 775; order for, not a waiver of irregular plea, 204; annexing of, to record, 257, 265.

Parties to suit, when privileged from arrest, 114.

Partners, delivery of attorney's bill to, 47; execution against, 397; one of them signing a cognovit or warrant of attorney, 487, 492; judgment on, 497; *see* "*Several Defendants*."

Passing of record of Nisi Prius, incipitur on, 221. Repassing of, *see* *Addenda*, reg. 18.

Patent, change of venue in action for infringement of, 728.

Pauper, *see* "*Poverty*;" action by, 699; who admitted to sue in forma pauperis, 697; how admitted, 697; proceedings, &c. on, 697, 698; effect of the admission, 698; costs in case of, 698; dispaupering him, 698; trial at bar, 269; where defendants in ejectment were paupers, put in by solvent party, he made to pay costs, 542, 544.

Pawn, things pawned saleable under fi. fa., 392.

Payment, to agent of attorney, 28; to attorney, 37, 39; to sheriff under an execution, 399, 412; of attorney's bill, when taxable, &c. after, 50; by sheriff to discharge himself on regular proceedings against him for not bringing in body, &c., 148; how and when reimbursed, 148, 149; for copy, &c., of declaration filed, 191, 192.

Payment of money into Court, generally,

General rule as to, 736; when most advisable to pay it in, without plea of tender, 736.

*In what cases*, 736; enactment of 3 & 4 W. 4, c. 42, s. 21, as to, 736; in assumpsit, 736; in debt, 737; in covenant, 737; in trespass, 737, 738; in replevin, 591, 737; in ejectment, 562, 749, 737; in actions against carriers, &c., 737; in actions by executors, 737; in actions by assignees of bankrupt, 738; in actions against justices, constables, &c., 693,

738; taking money out of court, waives irregularity in paying it in, 738; where several counts, 738; demurring to one of several counts, and paying into Court not allowed, 738.

*When and how paid in, and costs on, 738; before plea, &c., 738; on part of declaration, 738; practical directions, 739; paying in interest, 739; paying a further sum in, 739; defendant's undertaking to pay costs, 739; attachment for nonpayment of, or signing judgment for nominal damages, 739; from what time costs to be paid, 739, 740; where defendant previously tendered amount, &c., 739, 740; when defendant will not be bound to pay costs, 740.*

*Effect of it, 740; how far acknowledgment of action, &c., 740; on special declaration, 740; on indebitatus counts, 741; on one of several counts, 741; instances, 741; what unnecessary to prove after, 741; on bill of exchange, &c., 741; on goods sold, &c., 741; on policy of insurance, 741; does not admit legality of contract, &c., 741; or prevent setting up fraud, 741, 742; admits right to sue in the Court, 742; in particular character, 742; in case of statute of limitations, 742; plaintiff's taking money out of Court and not proceeding, does not render him liable to action, &c., for arrest without probable cause, 742; plaintiff may be nonsuit after, 742; but defendant cannot demur to evidence, 742; nor obtain a new trial, 819; defendant can never take it out, 742; but Court may sometimes impound it for him, 742.*

*Proceedings after it, 742; plaintiff taking it out, 742; his right to costs on, 742, 739, 740; entitled to, unless he proceeds to trial and fails, 742, 743; costs of one count only, 743; costs where money paid in under consolidation rule, 743, 738; defendant's costs on verdict for him, or nonsuit, 743; costs on discontinuance, 743; practical directions, 743; mode of proceeding if plaintiff at once takes the money out of Court, 743; proceeding thereon against defendant by attachment, 743; or by signing judgment for nominal damages, 743, 744; where plaintiff to be considered as proceeding in the action, 744; proof of payment into Court does not entitle plaintiff to reply at trial, 744; new trial after not allowed, 819.*

*Payment into Court, on plea of tender,*

*Mode of, 744, 739; on plea of set-off, &c., 207; in replevin, 744; in involuntary trespasses, 744; in actions against justices, officers, &c., 744; payment on a particular count, rule for, &c., 744; defendant cannot ever take it out, 744; plaintiff always may, 745; plea of tender without paying into Court, a nullity, 744, 204; nonsuit after, 301, 742, 204.*

- Payment into Court or to sheriff, in lieu of bail, &c.  
 To sheriff, 126, *see* "*Deposit*;" in lieu of special bail, 180, *see* "*Bail, Special*."
- Payment of debt and costs, &c., staying proceedings on, 744; *see* "*Staying Proceedings*."
- Peers and Peeresses, &c., may be rejected as bail, 169; privileged from arrest, &c., 65; form of process against, 617, 441; former process, 617, 618; execution against, 618; attachment against refused, 928, 933; cannot be taken in execution, 409, 617; unprivileged person in custody becoming a Peer, 617, 618; bail discharged in such case, 427; exempt from being jurors, 290.
- Penal actions, jurisdiction of the Court in, 2, 754; corporation cannot sue as common informer, 620; arrest in, not allowed, 81; staying proceedings in, 754; staying proceedings on payment of penalty, &c., 748; staying proceedings on, where several actions, 752; security for costs, 763; nonpros in, if regular, will not be set aside, 791; judgment as in case of a nonsuit allowed in, 805; no damages in, 307, 308; where several counts, and one bad, 310; compounding of, 780; *see* "*Compounding*."
- Penalty, arrest for, when not allowed, 80; affidavit of debt for, 90; 91; damages in an action for, 307, 308, 311; defendant accountable only to extent of, in debt on bond, 523; staying proceedings on payment of, 747; after payment of, satisfaction to be entered on record, 523; execution in case of, 377, 526; poundage on judgment for, 387; in replevin bond, 596.  
 ——— for attorney practising without certificate, 23, 24; paying money into Court on, 748.
- Per minas, plea of, need not be signed in K. B., 207.
- Peremptory paper, 59, 60, 884.
- Peremptory rule to declare, 187; meaning of term "*peremptory*" in such case, 187.
- Peremptory undertaking on discharging rule for judgment as in case of a nonsuit, 808, 809; notice of trial on, 224, 809; on setting aside nonsuit, 302.
- Performance of covenants, &c., bond for, within 8 & 9 W. 3, c. 11, 522.
- Perjury, by an attorney, in procuring admission, 22; on other occasions, 40, 43; by bail, 170, 175; staying proceedings on execution pending indictment for, 375, 755; affidavit of debt must be such as to found assignment of perjury on, 84.
- Personal actions, jurisdiction of court in, 1, 2; by what process commenced, 3; ejectment is not a personal action, 552, n.
- Personal service of writ of summons, 450; of ejectment, 531.
- Personating bail, felony, 175.
- Petition to sue in formâ pauperis, 697.  
 ——— by and against prisoner for discharge under Lords' Act, 653, 655, *see* "*Prisoner*;" under 48 Geo. 3, c. 123, s. 1, 656.  
 ——— to treasury upon a special capias utlagatum, 708, 709.
- Petitioning creditor, damages in action on bond of, 307; bond of not within 8 & 9 W. 3, c. 11, 522.

Physicians exempt from being jurors, 290.

Pillory, punishment of bail, &c., 175, 170.

Pilot, exempt from being juror, 290.

Pipe office, 709.

Placita, 255; *see* "*Nisi Prius Record*."

Plaint in replevin, &c. 579; observations as to, 577; how made, 577; how removed, &c., 578.

Plea, &c., in general,

*Notice to plead, and time to plead*, 193; notice necessary, 193; how given, 193; form of, 194; mistake in, 194; time to plead in general, 194; between the 10th August and 24th October, 195; imparlances abolished in personal actions, 195; term's notice, 195; after delivery of oyer, 195; after order, &c., for particulars, 195; after a stay of proceedings, 196; after amendment, 196.

*Rule to plead*, 196; necessary, 196; when not, 196; how obtained, 196; when may be, 197; entry of, 197; time limited by, 197; when plaintiff may sign judgment after expiration of, 197; when new rule to plead necessary, 205.

*Demand of plea*, 197; when necessary, 197; when not, 197; when a waiver of bail, &c., 198; if plea irregular, &c., 198; form of demand, 198; service of, 198; sticking up in King's Bench office, 198; when made, 197, 198; when plaintiff may sign judgment after, 198; when defendant waives necessity for it, 197, 198.

*Further time to plead, &c.*, 199; when granted, 199; how long, 199; mode of obtaining it, 199; in case of order for particulars, 199; summons for, should be attendable before time expires, 199; time, how reckoned, 199; when plaintiff may sign judgment after, 200; upon what terms, and their consequences, 200; pleading issuably, rejoining gratis, &c., 200; discretionary in judge to order such terms, 200; what an issuable plea, 200; what not, 200, 201; when a demurrer is or is not, 200, 201; rejoining gratis, meaning of, 201; when plaintiff may treat plea as nullity and sign judgment, 201; plea merely informal cannot sign judgment, 201; distinction between nullity and irregularity, 201.

*Judgment for want of, &c.* 202; when to be signed, 202; time for pleading must have expired, 202; in cases of oyer or particulars, 202; where further time to plead granted, 202; what pleas are nullities, 202; sham pleas, 203; *see Ad-denda*, reg. 2, 8; pleas merely defective, 204; where plea answers only part of action, &c. 503, 504; order for particulars of set-off, no waiver of right to sign judgment, 204; sometimes advisable to apply for leave to sign judgment, 204; signing judgment for not paying money into court, on plea of tender, 204; for not verifying dilatory plea, 204; for setting out deed falsely, &c., after oyer,

204; for irregularity in filing or delivering plea, 204; for pleading double without a rule, 205; for pleading without counsel's signature, 205; for pleading without taking declaration out of office, 205; for pleading before appearance, 205; for withdrawing plea without leave, 205; taking plea out of office, a waiver of irregularity in pleading without order for changing attorney, 205; judgment to be signed of term of rule to plead, 205, 206; when new rule to plead necessary, 205; how judgment signed, 205, 206; cannot be on dies non, 206; setting aside the judgment, 206; when regular, 206; when irregular, 206.

*The plea, how delivered, signed, &c.*, 206; must first appear, 206; then take declaration out of office, 206; by new attorney, 37; general issue, how pleaded, &c., 206; must not be delivered after 10 at night, 207; notice of set-off, &c., 207; how pleaded, &c., 207; notice to dispute act of bankruptcy, 207; other general pleas, 207; no pleading concluding to country need be signed, 207; what general pleas need not be signed, 207; how engrossed, 207; all pleas to be now delivered, *see Addenda*, reg. 1; consequence of improperly delivering, &c. 207; special pleas, 208; should be signed by counsel, 208; practice as to putting through door of office of clerk of papers should be avoided, 208; double pleas, 208; leave to plead when necessary, 208; how obtained, 208; when granted or refused, 208, 209; practical directions as to, 209; when to be filed, 209; defendant must have appeared, 210; withdrawing pleas, 210; leave of Court necessary for, 210; when granted, 210; when not, 210; ruling to abide by no longer necessary, 210, 212; time to plead after, 211; adding pleas, 211.

*Amendment of, &c.*, 841; *see "Amendment;"* what defects in aided by verdict, &c. 842.

Plea in abatement, or to the jurisdiction, 469; *see "Abatement."*

Plea puis darrein continuance, 286; in what cases, 286; when to be pleaded in banc, 287; when at nisi prius, 287; setting aside, &c., 288; affidavit to verify it, 289; defendant cannot plead double, 288; in what cases plea may be amended, 288; effect of it, 288; proceedings upon it, 289.

Plea, in ejectment, 540.

Plea in bar, in replevin, 589.

Plea, in scire facias, 615.

Plea, in actions against hundredors, 627; in actions against attorneys and officers, 633; in action against marshal for escape, 634; in actions against prisoners, 641, 645; in actions against executors, &c., 663, 664, 665; in actions against heirs or devisees, 669; in actions against bankrupts, 686; in actions against justices of the peace, officers of the customs and excoise, &c., 693.

- Plea after removal of cause from inferior court, 723.  
 Plea in error, 350, 351, 371.  
 Pleader, articles of clerkship to, 17, 18.  
 Pledges, statement of, in personal actions, discontinued, 189.  
 Plene administravit, plea of, need not be signed, &c., 207, 664;  
     judgment of assets in futuro on, &c., 664; proceedings on,  
     664; judgment on, 665, 666; costs on, 666; execution on, 666;  
     scire facias after, 608, 665; scire fieri inquiry on, 667.  
 Pluries, capias, 109; writ of summons, 451; fi. fa., 389; elegit, 403;  
     ca. sa., 409.  
 Policy of insurance, *see* "Insurance."  
 Polls, challenge to, 295.  
 Pone, writ of, &c., 580; when to be used, &c., 580, 581.  
 Pone per vadios, 582.  
 Poole, direction of writs to, 98.  
 Pope's bull or licence, how proved, 238.  
 Posse comitatus, sheriff not bound to raise, on mesne process, 120;  
     but is, on final process, 384, 555.  
 Possession, writ of, &c., in ejectment, 553, 554; taking possession  
     without force, 555, 529; demand of, in ejectment, 563.  
 Post, sending writ by, when not sufficient, 450; sending ejectment  
     by, 533.  
 Post obit bond, damages in action in, 307; entering up judgment  
     on old warrant of attorney to secure, 508; bond not within 8  
     & 9 W. 3, c. 11, 522.  
 Postea, what, 314; when and how drawn up, 314; entering and  
     marking before judgment, 318; in what cases amendable,  
     846, 315; where lost, 848, 315; proof of and by, 230.  
 Postetas, clerk of, 9.  
 Pound breach, jurisdiction of Court in actions for, 1.  
 Pound for goods distrained, 574; overt and covert, 574.  
 Poundage to sheriff, allowance of, on deposit in lieu of bail, 127;  
     upon writs of execution, 385, 386, 387; on habere facias, &c.,  
     555; on special capias utlagatum, 708; on attachment, 934;  
     expenses of selling the goods, 386; of keeping possession, &c.,  
     386; sheriff's remedy for, 387; remedy against sheriff, &c.,  
     for extortion, 387.  
 Poverty, *see* "Pauper;" excuse for attorney's not taking out certi-  
     ficate, 25; where defendant poor, more than two bail allowed,  
     150; ground for rejecting bail, 168; trial at bar, 269.  
 Practising attorney, must be so to entitle him to privilege, 32.  
 Præcipe, for writ of capias, 109; for writ of summons, 448.  
 Premature action, 105.  
 Prerogative of crown, *see* "King."  
 Prescription, when persons exempt by, from being jurors, 290.  
 Presentment, in copyholds, proof of, 235.  
 Prevarication of bail, 169.  
 Printing, no objection that the declaration is printed, 188.



Priority of writs of execution, 379, 380.

Prison, of King's Bench, chaplain of, 9; clerk of day rules in, 9; clerk of papers of, 10; marshal of, 12; deputy of marshal of, 12; marshal, &c., must reside within rules, 12; turnkey of, being articulated as clerk, 17; rules of, 646; day rules, 647; regulations as to, 647, 648; admission of attornies, &c. into, 648; delivery of papers, &c. to turnkey, 640, 641, 642, 645; *see* "*Marshal*," "*Prisoner*."

Prison, lodging, &c., of defendant in, after arrest on mesne process, 130; after arrest on final process, 411; mode, &c., of rendering principal to, 422, 424; right of admission to, &c., 648.

Prisoner, proceedings against in custody of the marshal,

*Process, &c. in bailable actions at suit of same plaintiff, for a different cause of action, or at the suit of another plaintiff*, 635; former process by bill abolished, 635; former process considered, 635; present process of detainer, 636; form of, 636; affidavit of debt, 636; statute requires form of detainer to be adhered to, 637; practical directions as to suing out, 637; mode of executing writ, 637; return of, 637; if defendant in custody on criminal account, leave necessary to detain him on civil process, 637; practice when in custody on criminal account in other gaols, 638.

*Process in nonbailable actions against*, 638.

*Bail for*, 179, 180.

*Declaration, &c.*, 638; when to declare, 638; consequences of not declaring, 638, 649; supersedeas, 638, 649; when plaintiff excused from, 630, 639; agreement in writing as to, 638; action against several defendants, 639; when in custody on criminal charge, leave necessary to declare, 639; notice of writ of error or other matters, &c., to be given to marshal, &c., for purpose of preparing lists, &c., 639, 640; subsequent proceedings on his being discharged out of custody for not declaring, 640; mode of, and practical directions as to declaring, 640; former mode, 640; what a waiver of justification of bail, 640; form of declaration, 640; delivery of papers, notices, &c., to turnkey, 641; no longer requisite to have a habeas corpus, 641.

*Plea, &c.*, rules as to, same as in ordinary cases, 641; *see* "*Plea*."

*Trial, judgment, &c.*, 641; when plaintiff must proceed to trial, 641; when he must proceed to a final judgment, 641, 649; consequences of not proceeding, 641, 649; rules as to, 641; agreement in writing, &c., to bar supersedeas, 642; issue, notice of trial, &c., may be delivered to turnkey, 642.

*Execution*, 642; when plaintiff must charge defendant in, 642, 650; consequences of not charging, 642, 650; rules as to, 642; what an excuse for not, 642, 643; mode of charging him, 643; committitur, 643; marshal's acknowledgment, 643; habeas corpus in case of removal to the Fleet, 643; where prisoner in custody on criminal account, 644; exe-

cution by fi. fa. against, before charged in execution, 376  
warrant of attorney by prisoner in, 493.

Prisoners, proceedings against in custody of sheriff,

*Preliminary observations*, 644; as to mode of declaring, 644;  
process in nonbailable actions, 644; defendant may put in  
bail any time before final judgment, and be discharged,  
644, 645.

*Process in bailable cases*, 645, 118; when in custody on cri-  
minal account, leave of Court, &c., necessary to charge  
him, 645.

*Bail*, 179.

*Declaration*, 645; time for declaring, 645, 638; consequences of  
not declaring in time, 638, 649; mode of declaring, 645.

*Plea*, &c., 645; same as usual, 645, 641.

*Trial*, &c., 645; time for proceeding to, and consequences of  
not proceeding, 645, 641, 649.

*Execution*, &c., 645; time for charging defendant in, 645, 642;  
consequences of not charging, 642, 650; mode of charging  
him, 645, 646; execution by fi. fa. against, before charged  
in execution, 376.

Prisoners, removal of, into the custody of the marshal,

*By habeas corpus cum causa*, 714; by defendant himself, 714;  
by plaintiff to declare against him, 714; but this not neces-  
sary, 714; to render in discharge of bail, 714, 420; how  
writ obtained, 715; form of, 715; how executed, 715;  
commitment on, 715; other proceedings, 715.

*By habeas corpus ad respondendum*, 716; no longer requisite  
for purpose of declaring, &c., 716; form of, 716; how sued  
out, &c., 716, 715; proceedings on, 716.

*By habeas corpus ad satisfaciendum*, 716; to charge defendant  
in execution, 716; form of writ, 716; how sued out, 715,  
716; proceedings on, 716; mode of charging defendant in  
execution, 643.

Prisoners, proceedings by,

*Preliminary observations* &c., prisoners in King's Bench may be  
charged in civil actions only, 646; rules of the prison, 646;  
security for keeping within, 646; boundaries of those rules,  
646; day rules, 647; petition &c., for, 647; allowances to  
prisoners out of county rates, &c., 647, 648; five only to  
lodge in one room, 648; officers, &c., not to supply food or  
work for prisoners, &c., 648; admission of friends, attor-  
nies, &c., to visit prisoner, 648; complaints of exactions  
or extortion, &c., 648.

*Discharge of*, by *supersedeas*, for not declaring, 649; time for  
declaring, &c., 638; where prisoner in custody on criminal  
account, 649; for not proceeding to trial, 649; for not  
proceeding to final judgment, 649; time limited for, 641;  
when plaintiff excused, 641, 649; for not charging him in  
execution, 650; time limited for, 642, 650; when plaintiff

excused, 642, 650; agreement for compromise, &c., 650; notice of application for discharge as insolvent debtor, &c., 650; notice in writing to marshal of, ground of excuse for not declaring, trying, or charging in execution, &c., 639, 651; once supersedeable always supersedeable, 651; explanation of that rule, 651; effect of supersedeas, 651, 653.

*List of prisoners supersedeable, &c.*, 651; marshal, &c., to deliver it to judges in first four days of term, 651; notice of special matter to marshal, &c., to prevent a supersedeas, 639, 651; if prisoner supersedeable for one month, to be discharged although not superseded, 652.

*How supersedeas obtained, &c.*, 652; how obtained on ground of plaintiff's not declaring when in custody of marshal, 652; the like, when in custody of sheriff, 652; how obtained in other cases, 653.

*Effect of supersedeas, &c.*, 653, 651; once supersedeable always so, 651; meaning of that rule, 651, 653; consequence of being superseded after judgment, 653; arrest after, 653; supersedeas when pleadable to action on judgment, 653; action against prisoner by third person, 653, 78; by plaintiff for a different cause, 653, 77.

Prisoners, discharge of, under the Insolvent Acts,

*Proceedings under Lords' Act, on prisoner's own petition*, 653; repeal of acts, 63.

*Proceedings under the compulsive clauses of Lords' Act*, 654; prisoner in custody for debt, &c., not exceeding 300*l.*, 654; who within the act, 654; practical directions, 654; notice to detaining creditors, 654; notice to sheriff or gaoler, 655; petition, &c., 655; affidavits necessary, 655; motion, 655; what to be done on prisoner being brought up, 655; delivery of account of estate and debts, &c., 655; remanding of prisoner, 655; assignment of prisoner's effects, 656; discharge of prisoner, 656; indictment against for not delivering up effects, &c., 656.

*Proceedings under 48 Geo. 3, c. 123. s. 1*, 656; prisoner in custody for debt, &c., not exceeding 20*l.*, 656; cases within act, 656, 657; application for discharge must be made to Court, 657; mode of making application, 657; practical directions, 657; notice of application, &c., 658; effect of discharge being fraudulently or unduly obtained, 658; remanding of, in case of, 658; *ca. sa.* after, 658; application for leave, 658.

*Subsequent proceedings against insolvents*, 658; where defendant discharged under Lords' Act, 658, 607.

— discharge of, by other means,

Where attorney declares writ was not issued by him, 659; for defect in affidavit or writ of *capias*, 82 to 111; upon putting in and perfecting bail before judgment, 179, 659; on abatement of action, 659; on discontinuance, 659; on compromise or settlement of action, 659, 128, 437; pay-

- ment of amount of judgment, 659; discharge in such case to be given by attorney, when, 659, 54, 437; discharge of prisoner in execution, a discharge of debt, &c., 659, 414; aliter of a discharge from mesne process, 659, 414; becoming bankrupt and obtaining certificate, 660; where defendant's wife becomes administratrix to deceased plaintiff, 660; on death of plaintiff, &c., 660.
- Prisoner, description of, in affidavit, 83; limitation for writ of error by, 325; cognovit or warrant of attorney given by, 488, 493, 494; attorney, prisoner, when may practise, &c., 28.
- Privies, writ of error by, 326.
- Privilege of attorneys and officers, 31; to sue by attachment of privilege, abolished, 31; to be sued by bill, abolished, 31; from arrest, 31; when left off practising, 32, after omission to take out certificate, 32; not to answer privileged communications, 32.
- Privilege, attachment of, abolished, 3.
- Privilege, writ of, how sued out, 69.
- Privilege from arrest, 65—78; consequences of arresting privileged person, 66, 67, 69; when will be discharged, 93, 409; when to be pleaded, 93, 65; when best for sheriff not to notice, 409, 413.
- Privilege of speech, enjoyed by counsel, 276, 277.
- Privileged communications, 32.
- Privy verdict, 285.
- Probate of wills, proof by, 235.
- Procedendo, in replevin, 581; after removal of cause from inferior Court, generally, 721, 722. *See "Removal of Causes."*
- Proceedings, generally, *see the different titles throughout this Index.*
- Proceedings against the sheriff, 131—138; *see "Sheriff, Proceedings against;"* on the bail bond, 139—142; *see "Bail Bond;"* setting aside or staying such proceedings, 142.
- against bail to the action, 429; against bail in error, 436; *see "Bail, Proceedings against."*
- setting aside for irregularity; *see "Irregularity," "Waiver."*
- staying of, *see "Staying Proceedings."*
- in Courts, how proved, 229, 233.
- Process, *see the different titles of Process throughout this Index;* by what process personal actions commenced, 3; the ancient process considered, 3; amendment of mesne process, 836, 111, 452; amendment of final process, 850, 379; what defects in aided after verdict, &c., 837; defects in, no ground for writ of error, 837; entry of, on roll, to save statute of limitations, 699.
- Processu continuato, entry of, 481, 323.
- Prochein amy, how appointed, &c. to sue or defend, for infant, 673, 676; liability for costs, &c., 674, 675, 677; cannot be a witness, 675.

- Proclamations, writ of, 704, 705, 710; of state, how proved, 238; on a fine, how proved, 231.
- Proctor, when bill for fees paid to, taxable, 49; exempt from being juror, 290.
- Production of books, &c., at trial, how enforced, 245; *see* "*Inspection.*"
- Profert of deeds, &c. 765; *see* "*Oyer.*"
- Prohibition, either party may make up issue in, 219; no judgment as in case of a nonsuit in, 805.
- Promissory note, *see* "*Bill of Exchange.*"
- Proof of debt, how far a discontinuance of action against bankrupt, 686.
- Property, what property bail must swear to, 157, 166, 168; what may be taken, in execution, 390, 404; of sheriff, in goods taken under fi. fa., 402; claim of, in replevin, 577.
- Proprietary probanda, writ of, 577.
- Propter defectum juratorum, &c., plea of puis darrein continuance, 287; challenges for, &c., 293.
- Prorogation of parliament no abatement of writ of error, 334.
- Prostitution, warrant of attorney for, set aside, 496.
- Protection, writ of, 114.
- Prothonotary, 13.
- Proviso, trial by, in what cases, 801; seldom adopted, 801; when and how obtained, 801; making up issue or paper book on, 219; notice of trial, 802; not necessary to give a term's notice of, 802; passing record, &c., 802; trial by, 225; nonsuit in, 301, 802.
- Public acts of state, how proved, 238; public statutes, how proved, 229.
- Public companies, entries in their books, how proved, 237; execution against clerk of, 378.
- Public verdict, 285.
- Puis darrein continuance, plea of, 283, 286; *see* "*Plea puis darrein continuance.*"
- Punishment, of attornies, &c., for misconduct, &c., 40; of officers for extortion, &c., 8.
- Purchasers, relation of judgments as to, 321; docketing of judgment to affect, 322, 323; when bound by writ of execution, 379; of goods from sheriff under execution gain a good title, when, 379, 388; of goods in market overt, 379.
- Putting off the trial,  
*In what cases*, 796, 272; where unsafe to proceed to trial, 796; absence of material witness, 797; illness of attorney, 798; libel, &c. published, 798; demurrer pending, 798; other suit pending, 798; counsel not prepared, 798; to amend declaration, 798; where party arrested while about to attend cause, 798.  
*Application for*, 798; when to be made, 798; who may hear it, 798, 799; notice of application, 799; brief to counsel, 799; affidavit to ground motion, 799; hearing of motion, 799.  
*Costs on*, 800.

## Q.

- Quaker, affirmation of, on admission of, as attorney, 22.  
 Quando acciderint, judgment of assets against executor, &c., 664, 666; judgment of, against heir, 670, 671; sci. fa. on a judgment of, 608.  
 Quare erronice emanavit, restitution on, 556.  
 Quare impedit, either party may make up issue in, 219; no judgment as in case of a nonsuit in, 805.  
 Quashing plea, 204, 272; judgment of on plea in abatement, 473; writ of error, 332; costs in, 333; *see further "Setting aside Proceedings."*  
 Queen regnant, privileged from arrest, 65; so are servants of, 65.  
 Qui tam, attorney privileged from being held to bail in action, 69; process in, 102; plea in, when not a nullity, &c., 203; writ of error in action of, 330.  
 Quod recuperet, judgment of, 473; *see "Judgment."*

## R.

- Re-admission of an attorney, 24, 25; after being struck off the roll, 43, 44.  
 Read, marking of concilium, 478.  
 Reading over warrant of attorney, 493; declaration in ejectment, 534.  
 Real action, Court of King's Bench has no jurisdiction in, 1; no damages in, 307; writ of error in, 325.  
 Real property, new trial where a question of inheritance arises, 818.  
 Reasonableness of charges in attorney's bill, 52.  
 Rebutter, 213, 214.  
 Receiver, attorney acting as, lien of, &c., 30.  
 Receiving papers, &c., *see "Waiver."*  
 Recognizance of bail, arrest in action on, not allowed, 70, 80; entering of, 174, 431; where amendable, 838; damages in action on, 308; interest on error in action on, not given, 355; scire facias on, 431, 610; debt on, 434; in ejectment on 1 Geo. 4, 87, 565; on removal of cause under 20% from inferior Court, 719, 722.  
 Recognizance, not to commit waste pending error, &c., 549, 567.  
 Record, of nisi prius, 254; in ejectment, 546; in ejectment on 1 W. 4, c. 70, 569, 570; on an attachment, 935; *see "Nisi Prius Record."*  
 ———, how proved, 229, 230; notice to admit, 228; amendment of statement in, at trial, 231, 232; damages in action on, 307.  
 ———, trial by, generally, 482; *see "Nul Tiel Record;"* bespeaking of record at Treasury, &c., 483.  
 Record, in what cases withdrawn, 273.  
 Recordari facias loquelam, 580; proceedings on, 581, 582.  
 Recovery, how proved, 231.

- Reducing damages. *See* "*Remittitur*."
- Re-examination of witnesses, 280.
- Reference to master to compute, &c., in what cases necessary or not, 509; mode of proceeding on, 520, 521; irregularity previous to judgment cannot be taken advantage of against the rule to compute, 520; in case of lost bill, 521; after death of party, 521.
- Registers, how proved, 237.
- Registry of judgment, 323.
- Rejoinder, 213; rule for, when necessary, 213, *see Addenda*; time after, 213; demand of, when necessary, 213; when must be signed, 213; judgment for want of, 505.
- Rejoining gratis, what, &c., 201.
- Relation, of judgments, 321, *see Addenda*; of writs of execution, 379.
- Release by client, to prejudice of attorney, 54; by co-plaintiff, when set aside, 286, n.; plea of release puis darrein continuance, 286, 287; in ejectment by one of several lessors, 540; assignment of error, &c. on, 348, 351; agreement of release of errors in warrant of attorney, 492, 501; plea of release of errors, 351; of witness, by plaintiff, 279.
- Relicta verificatione, cognovit, &c. on, 488, 490.
- Relief of sheriffs and other persons in case of adverse claims, &c. 756, 759.
- Remainder-man, writ of error by, 326; admitted to defend in ejectment, 541.
- Remanding prisoner, when brought up under Lords' Act, 655.
- Remanet, notice of trial on, 224, 228; re-sealing distringas, 259; entry of cause in case of, 267; order of trial of, 271; judgment as in case of a nonsuit after, 805, 806; costs in case of, 860.
- Remittitur damna, entry of, 815, 312; in what cases, 309, 312, 815, 817; on reference to compute, 510.
- Remittitur of record, by the court of error, 335.
- Removal of prisoners into the custody of the marshal, 714; *see* "*Prisoners*," "*Habeas Corpus*."
- Removal of causes from inferior courts,  
*How and in what cases*, 718; from courts not of record, 718, 580; by pone, re. fa. lo. and accedas ad curiam, 718, 580; from courts of record, 718; by habeas corpus cum causâ, 718; removes the body and cause, 718; only lies where process against the person, 718; not where suit commenced by plaint, 718; by certiorari, 718; lies in most cases, 718; not adopted where defendant has not been arrested, 718; usual to issue a habeas, 718; in what cases and under what restrictions a cause cannot be removed, 718, 719; where cause of action under 5*l.*, 719; where under 20*l.*, 719; where action only lies in inferior court, 719; to the counties palatine, 719; after judgment, 719; to have execution, &c., 719; form of writ, 719; affidavit to obtain, 719,

720; how sued out, 720; delivery of to judge, &c., of inferior court, 720.

*How obeyed and returned*, 720; how far suspends proceedings, 720; bringing defendant in custody, &c., 720, 715; returning record, &c., 720; return, 720.

*Bail and appearance*, 720; where defendant already in custody, 720, 715; defendant not to be admitted to bail in inferior court, 720; compelling him to put in bail by rule for procedendo, 721; bail how put in, 721; notice of, 721; where several defendants, 721; exception to bail, 721; notice of justification, 721; justification, 721; liability of bail, 721; bail in inferior court discharged, 721; filing common bail in nonbailable actions, 721; recognizance for debt and costs where debt under 20*l.*, 722.

*Procedendo*, 722; where it lies, 722; how obtained, 722; how sued out, 722; how executed, 722; effect of, 722; consequence of sheriff taking further proceedings after, 581, 582; after cause has been remanded cannot again be removed before final judgment, 722.

*Proceedings after removal*, 722; compelling plaintiff to proceed, 722, 583; proceedings commence de novo, 723; declaration, 723; time for pleading, 723; costs, 723.

*Render by bail*, 418; in discharge of bail to sheriff, &c., 418, 132; who may so render, 418; when, 418; putting in bail to the action for, 421; who may be so put in, &c., 421; render in discharge of bail to the action, 418; when to be made, 418; in what time, 418, 419; when further time allowed, 419; when further time not allowed, 419; how made when principal not in custody, 420; when in custody, 420, 425; habeas, when necessary or not, 420; practical directions as to render to King's Bench when principal not in custody, 422; how bail may arrest, &c., 422; notice of render, &c., 423; mode of obtaining exoneretur, 424; practical directions as to render to county gaol when defendant at large, 424; render after escape, 425; where defendant in custody on criminal account, 420, 425; who to have benefit of render, 425; to what time the render relates, 425.

*Rent*, affidavit of debt for, 89; change of venue in action of debt for, 727; payment into court in debt for, 737; staying proceedings on payment of, 749; reference to compute in action for, 509; writ of inquiry in action for, 511; ejectment for, 559; staying proceedings on payment of, 543, 562, 749; ejectment for, and surplus after execution, 555; rent to be paid to landlord before goods sold under execution, 397, 708; provisions and cases as to, 397, 398.

*Rent*, double, action for arrest allowed in, 81.

*Rent-charge*, extending of, 405; payment into Court on avowry for, &c., 591; costs in replevin as to, 593.

*Repleader on immaterial issue*, 844.

*Replegiari facias*, writ of, 1, 577.



**Replevin.** As to the distress, see "*Distress.*"

*Jurisdiction of Court in, 1.*

*How obtained, 577; ancient writ of replegiari facias, 577; proceedings thereon, 577; now obsolete, 577; present mode of replevying, 578; pledges in, 578; how taken, 578; bond for, 578; practical directions, 578; replevy must be made before goods sold, 579; replevy where goods eloigned, 579; capias in withernam, 579.*

*Plaint in County Court, 579; when to be made, 579; consequences of not making, 579; entering of plaint is the act of the party, &c., 579; sheriff's neglect to enter, 579; when plaint cannot be prosecuted in County Court, 580; where freehold, &c. comes in question, 580; where property is claimed, 580.*

*Plaint, how removed, 580; by whom, 580; cause for removal, 580; by pone, 580; nature of that writ, 580; by recordari facias loquellam, 580; by accedas ad curiam, 581; by certiorari, 581; practical directions as to suing out, &c., these writs, 581; return of, 581; practice on return of, 581; filing of return, 581; delivery of writ to sheriff or judge of inferior court, how far a stay of proceedings, &c., 581; subsequent proceedings void, 582.*

*Appearance; Declaration, &c., 582; appearance when and how entered, 582; how to proceed, &c., where plaintiff wishes to expedite the cause, 582; pone per vadios, 582; distringas, 582; alias or pluries distringas, 582; motion to increase issues, 583; proceedings to outlawry on, 583; how to proceed where defendant wishes to expedite the cause, 583; form of declaration, 587.*

*Nonpros for want of declaration, 584; how obtained, 583, 584; judgment of at common law, 584; disadvantage of, 584; proceedings on, 584; writ of second deliverance, 584; retorno habendo, 584; capias in withernam, 584; restitution, 585; judgment of, &c., under 17 Car. 2, c. 7, 585; proceedings on, 585; inquiry for arrears of rent, 585; execution on such judgment, 585; statute does not bar common law judgment, 585; in many cases advisable to proceed under the statute, 585; assignment, &c., of replevin bond, 585.*

*Avowry, 586; practical directions, 586; how and when to avow, &c., 586; imparlance, when defendant entitled to, 586, 587; pleading without, 587; general imparlance, 588; special imparlance, 588; general and special imparlance, 588; pleading in abatement, &c., after, 589; where imparlance irregularly obtained, &c., 589.*

*Plea in bar, 589; practical directions, 589.*

*Nonpros for not pleading in bar, 589, 590; judgment of at common law, 589; judgment of under 21 Hen. 8, c. 19, 589; judgment of under 17 Car. 2, c. 17, 590, 585; assignment of replevin bond, 590.*

*Issue, 590; either party may make it up, 590, 219.*

*Demurrer, 590; judgment for defendant on at common law, 590;*

- the like on 21 Hen. 8, c. 19, 590; the like on 17 Car. 2, c. 7, 591; judgment for plaintiff on, 591.
- Staying proceedings*, on payment of rent, &c. 591, 748, 749; on distress damage feasant, 591.
- Payment into Court*, of rent, &c., 591; plea of tender, 591.
- Discontinuance*, withdrawing plea, &c., 591; defendant cannot discontinue, 591.
- Trial, &c., verdict and judgment*, 591; either party may proceed to, 591; nisi prius record, &c., 591, 592; trial by proviso, 592; defendant cannot have judgment as in case of nonsuit, 592; verdict for plaintiff, 592; damages in, 592, 308; verdict for defendant, 592; at common law, 592; under 7 Hen. 8, c. 4, or 21 Hen. 8, c. 19, 592; under 17 Car. 2, c. 7, 592; consequence of jury omitting to find amount of rent, &c., 592.
- Nonsuit*, 593; judgment on at common law, 593; on 21 Hen. 8, c. 19, 593; on 17 Car. 2, c. 7, 593.
- New trial*, 593; on verdict for plaintiff not in general allowed, 593.
- Costs*, 593; on verdict for plaintiff, 593; on nonsuit, &c., or verdict for defendant, 593; double costs, 593, 594.
- Execution*, 594, 377; for plaintiff, 594; for defendant under 17 Car. 2, c. 7, 594; for defendant at common law, 594; writ de retorno habendo, 594; fi. fa. or ca. sa. for costs, 594; return to retorno habendo, 594; capias in withernam, 594; scire facias, 594.
- Proceedings against sureties in replevin*, 595; see "*Replevin Bond*."
- Proceedings against the sheriff, &c.*, 597; where he has not taken a bond, 597; where he has taken an insufficient bond or pledges, 597; action against him, 597; extent of his liability, 597; taking assignment of bond no waiver of proceedings against, 597.
- Replevin Bond*, form of 578, 595; assignment of, 595; action on, 595; other remedies against sureties, 595; what a forfeiture of, 595; death of plaintiff, 596; action on, in what Court to be brought, 596; arrest in, not allowed, 70; to what amount plaintiff may recover, 596, 307; what may be pleaded to, 596; how far Court may relieve sureties, 596; how sureties discharged, 596, 597; interest on judgment in error on, 355.
- Replevin Clerk*, 597; see "*Replevin*."
- Replication*, 211; no time limited for replying, &c., 211; rule to reply, 211; when plaintiff must reply after, 211, 212; non-pros for not replying, 789; term's notice, 211, 212; no replying between 10th August and 24th October, 212; demand of replication not necessary after rule to reply, 212, 789; when replication must be signed, 212; must now in all cases be delivered, 212, see *Addenda*, reg. 1; notice of trial on, 213; withdrawing replication, 213; new assignment, 213; judgment for want of replication, 214; amendment of, 841.
- Replication*, to plea in abatement, or to the jurisdiction, 472.

- Replication, in ejectment, 545; in replevin, 589; in scire facias, 615.  
 Reply at trial, 281, 275.  
 Requests, Court of, *see* "*Court of Requests.*"  
 Rescous, jurisdiction of Court, in actions for, 1.  
 Rescue, when sheriff liable after, on mesne process, 129, 130; return of, to mesne process, 130; return of, on final process, 384, 412; plaintiff's remedy on, 412; penalty and punishment for, 130; attachment on, 930, 130; goods rescued on *fi. fa.*, defendant discharged, 402.  
 Residence, compelling attorney to disclose that of client, &c., 29, 447; of lessor in ejectment, 543, 763; of attorney, 28; attorney residing abroad, 25; statement of, in affidavit of debt, 83; in writ of capias, 103; indorsement of, on writ of capias, 108; statement of, in bail piece, 154, 155; in writ of summons, 443; indorsement of, on writ of summons, 447; statement of in plea in abatement for nonjoinder of defendant, 469.  
 Respite of jury, statement of, in nisi prius record, 255.  
 Responsalis, 33.  
 Respondeas ouster, judgment, &c. of, 473, 484.  
 Restitution, after error, 357; in ejectment, after execution, 556; when judgment or execution, &c., set aside, 388, 389.  
 Re-summons after claim of consuance, 724.  
 Retainer of attorney, how, &c., 33; proof of, 52.  
 Retorna brevium day, 58.  
 Retorno habendo, writ of, 584, 585, 594; proceedings on, 594.  
 Retraxit, 811, 814.  
 Return of writs, *see the different titles of Writs throughout this Index*; days for, 57; custos brevium, to set down time of return and filing, &c., 103, 384; mode of ascertaining return, 133; proceedings on, 131—135; mode of making, 384; when defect in, cured, 385; effect of, 385, 200; action for false return, 134, 385, 399; amendment of, 385, 453.  
 Returning issue or paper book, 220.  
 Revenue, attorney of, may practise, &c. without articles of clerkship, 17.  
 Reversal, of outlawry, 710; of judgment by writ of error, 353; costs on, 356.  
 Reversioner, writ of error by, 326.  
 Revocation of warrant of attorney, 494, 495; of arbitrator's authority, 909, 910.  
 Reviving judgment, scire facias for, 599, 374.  
 Riens per descent, plea of, need not be signed, 207, 670; plea of generally, &c., 670, 671.  
 Riot, actions against hundredors in case of, 621. *See* "*Hundredors.*"  
 Roll, when carried in, on entering issue, 221; how carried in, &c., 223; number of to be marked in nisi prius record, 256; judgment roll when necessary to carry in, &c., 322, 323; demand of number, &c., of, on noli tuel record pleaded, 482, 485; entry of process on, to save statute of limitations, 699.  
 Rolls of manor, proof by, 235, 236; inspection of, 236.

Routine of the business in the Court of King's Bench, 56.

Royal family, &c., cannot be arrested, 65, 409.

Rules, clerk of the, 10.

Rules, *granted upon motion by Counsel*, 881 to 891.

What rules granted on plea side or crown side of Court, 881; rules granted upon signature of counsel, how obtained, 881; how rule absolute in first instance obtained, 881; affidavit for, 881, 882; service of rule, 881, 29, 155; shewing original rule, when necessary, 882; shewing the original rule, 882; affidavit, when to be made, &c., 882; when to be filed, &c., 882; when affidavit must be specified in the rule nisi, &c., 882; title and jurat, &c., of affidavit, 899, 901; how rule nisi in first instance obtained, 882; in what Court, 882; order for hearing, 60; when cannot be made on last day of term, &c., 882; service of rule, 882; shewing cause at chambers, 883; irregularity in service of rule nisi, waived by shewing cause, 883; contents of rule nisi, 883; when and how far a stay of proceedings, 883, 782, 882; proceedings in the mean time, set aside, 782; rule drawn up by mistake corrected, 851; notice of motion, 883; shewing cause, 883, 884; enlarging rule, 883, 884; affidavits to shew cause, 884; argument, 884, 885; rule absolute, 885; costs of application, 885; moving for same cause a second time, 885; opening the rule, 886; affidavits on both sides must be filed, 882, 884, 905; computation of time, 58, 886; proof of rule, 284; amendment of, 851.

*Rules where motion-paper requires only signature of counsel*, rule for a concilium, 366, 370, 478; for a special jury, 261; that landlord be admitted defendant, instead of tenant, in ejectment, 542; for judgment against casual ejector, 536.

*Rules where the motion must be made in Court, but it is sufficient if counsel give the motion-paper to the clerk of the rules*, rule that money deposited with sheriff instead of bail, be paid over to plaintiff, no bail having been put in, 126; that money deposited with sheriff instead of bail, be paid over to defendant, bail having been put in and perfected, 126; upon motion to justify bail, 165, 178; the like as to bail in error, 345; peremptory, to declare, 187; to change the venue, 726; to discharge rule for changing the venue, 729; to refer it to master to compute principal and interest on bill of exchange, 521; to have witnesses examined upon interrogatories, with consent of both parties, 251; for costs for not proceeding to trial or inquiry, 604; for judgment as in case of a nonsuit, 807; the like after a peremptory undertaking, 809; that defendant have leave to enter a suggestion on roll, to entitle him to costs under a Court of Conscience act, 873; the like, to entitle the defendant to double or treble costs, 874; for judgment against defendants in several actions upon policies of insurance, who have entered into a consolidation rule, 735; to make judge's or-

der or order of nisi prius a rule of Court, 906; to make a submission to arbitration a rule of Court, 926; to enlarge time for making an award on consent of parties, 914; to make a rule absolute upon affidavit of service, in cases of course, where cause is never shewn, 885.

*Rules where the motion is made in Court, but the grounds of it not particularized*, rule that attorney deliver up writings, &c. where no cause in Court, 31; for habeas corpus ad respondendum, to charge a prisoner in custody on a criminal account, with a bailable writ or declaration, &c., 638, 639; for leave to compound penal actions, 780; for a general special imparlance, 588; that defendant be at liberty to waive plea, 211; that defendant be at liberty to withdraw general issue, and plead de novo, with notice of set-off, 210; the like, and to plead de novo, upon paying money into Court, 210; for leave to try before the sheriff in an action for a debt not exceeding, 201., 286; for leave to inspect and take copies of books, court rolls, &c., and to have them produced at the trial, 238, 771, 772; for relief by third parties against adverse claims, 756; for the like by sheriffs, 759; for leave to enter up judgment on old warrant of attorney, 498, 500; for leave to sign judgment on scire facias, where party not summoned, 614; for leave to issue a scire facias on judgment not more than ten and under fifteen years old, 600, 601, 612; to discharge insolvent debtor, under 48 Geo. 3, c. 123, s. 1, 657, 658; to make rule absolute upon affidavit of service, no cause being shewn, 685; for judgment on demurrer, when not argued, 479; for judgment on writ of error, when not argued, 351.

*Rules where the motion is made in Court, and the grounds of it particularized*, rule that defendant may be discharged out of custody, on entering a common appearance, 93; that bail bond be delivered up to be cancelled, 93; for further time to justify, 171; for time to inquire after bail, 173; to obtain money out of Court after judgment, when paid into Court in lieu of bail, 182; that an outlawry be reversed, 711; that plaintiff be at liberty to sue out a distringas to compel appearance or outlawry of defendant, 462; that service of declaration in ejectment, on the tenant's son or daughter, &c., may be deemed good service, 532; that superfluous counts, &c., be struck out of the declaration, &c., 733; to consolidate actions, not being on a policy of insurance, 735; that claim of consueance be allowed, 725; for time to declare, under special circumstances, 187; for leave to withdraw general issue, and plead specially, 211; for leave to withdraw a special plea, and plead specially, 210; for leave to add a plea, 210; that a writ of inquiry may be executed before a judge, 513, 514; for a trial at bar, 268; for a trial in a different county, 217, 869; to put off the trial, 798; for costs against a pauper for not proceeding to

trial pursuant to notice, or an undertaking, 698; to stay proceedings in replevin, upon payment of rent, &c., 591; to stay proceedings in ejectment, upon payment of rent or mortgage money, 562, 749; to stay proceedings upon payment of debt and costs, &c., in other than ordinary cases, 745; to stay proceedings in second action, until the costs of a former action be paid, 750; to stay proceedings in actions under 40s., 752; to stay proceedings in actions pending error, 764, 338; to stay proceedings in other cases, 754; to stay proceedings until security be given for costs, 764, 543; to stay proceedings in actions upon bail bonds, &c., upon terms, 146; to set aside a regular nonpros, upon terms, 791; to set aside a regular judgment by default, upon terms, 506; to set aside proceedings for irregularity, 782, 142, 110, 451; to set aside verdict or nonsuit, and to have a new trial, 824; to set aside the execution of a writ of inquiry, 519, 824; for judgment non obstante veredicto, 830; for leave to amend after judgment, 831; to arrest the judgment, 852; for leave to discontinue, after verdict, 794; for leave to enter up judgment nunc pro tunc, 603; for leave to enter suggestion on roll, to entitle defendant to costs on account of plaintiff's not having recovered amount for which defendant was holden to bail, 873; for plaintiff's costs of suit, in an action on a judgment, 855; for leave to take out execution in ejectment, after the landlord has failed in his defence, 542; for leave to take out execution pending error, 338, 552; for leave to enter up judgment on a warrant of attorney of ten years and not more than fifteen years old, 500; to examine witness on interrogatories, 251; for a mandamus for examination of witnesses, 252; that the master may review his taxation, 891; to set aside an annuity, 891; that securities be delivered up to be cancelled, 496; to revoke an arbitrator's authority, 909, 910; to compel attendance of witness, or production of documents before an arbitrator, 913; to enlarge time for making award, where one of parties withholds his consent, 915; to set aside an award, 924; to set aside a judge's order, 898; that an attorney may pay costs, &c., for negligence, &c., 40, 43; to make a rule absolute, where cause is shewn, 891.

Rules, *granted without motion by Counsel.*

*Rules obtained upon a judge's fiat*, that infant be admitted to sue by prochein amy or guardian, 674; that infant be admitted to defend by guardian, 676; that plaintiff may sue in formâ pauperis, 697; for rule to discharge a prisoner, upon bail being justified in vacation, 179; for rule for a distringas in nonbailable actions, in vacation, 462; for a rule to change the venue in vacation, 726; for a rule to plead several matters, not enumerated in rule, T. 1 W. 4, 209; for a rule to compute, in vacation, 521; for leave to sign judgment on scire facias, where defendant not summoned,

614; for a rule that writ of inquiry be executed before a judge at nisi prius, 514; for sheriff to return a good jury upon writ of inquiry, 514; for rule making submission to arbitration a rule of Court, 926.

*Rule obtained from clerk of rules, upon master's allowance*, rule for allowance of writ of error coram nobis, 368.

*Rules obtained from the clerk of the rules, upon a præcipe*, rule to plead generally, 196; to plead in scire facias, 615; to avow in replevin, 586; for a view, 264; to appear to a scire facias, 613; for judgment on demurrer, 480; for judgment on nul tiel record, 483; for judgment on scire facias, 613; for judgment on scire facias quare executionem non in error, 364; for judgment in error, 367, 370; to bring up insolvent debtor under Lords' Act, 645.

*Side-bar rules*, rule that the sheriff return the writ, 133; that the sheriff bring in the body, 135; for time to declare, or for further time, 187; for special imparlance, 588; for leave to pay money into Court, 181, 739; for leave to discontinue before verdict, &c., 794; to be present at the taxing of costs, 319; for a scire facias to revive a judgment more than seven years old, and not ten, 612; for marshal to acknowledge defendant in custody, 643; consent rule in ejectment, 532.

*Rule to plead several pleas obtained from the clerk of the rules upon the engrossment of the pleas, or a draft or copy thereof*, 893, 521.

*Rules obtained from the master*, rule to declare in replevin, 583; to reply, 211; to rejoin, surrejoin, &c., 213; to enter the issue, 221; the like, on demurrer, 478; to join in demurrer, 475; that defendant produce the record on nul tiel record, 483; to assign errors, not necessary, 364, 369, *see Addenda*, reg. 1; to return the certiorari in error to this Court, 365, 869; to join in error, 369. *See Addenda*.

*Rule obtained from clerk of papers*, rule to return the paper-book or demurrer book, 218, 477. *See Addenda*, r. 1.

*Rules obtained from the clerk of the errors*, for better bail, 345; to transcribe, 346; to allege diminution, 347; to assign errors, 347; to return certiorari in error to Exchequer Chamber, 850. *See Addenda*.

*Rules obtained from the filacer*, the rule to appear in replevin, 582.

*Rule rendered unnecessary by reg. gen. of H. T. 4 W. 4*, to join in demurrer, r. 3; for a concilium, r. 6, r. 14; to produce record, r. 8; to certify or transcribe the record, r. 10; to allege diminution, r. 11; to assign errors, 11; to return paper book, 1.

*Rule for judgment, after verdict, &c.*, 315, 317; after demurrer, 480; on nul tiel record pleaded, 483; on judgment by default, 505, 508; not necessary after writ of inquiry, 519.

*Rules of the King's Bench prison*, 646, 647; day rule, 647.

## S.

- Sailors, privilege of, from arrest, &c., 73, 409; how proceeded against, 74; affidavit, &c., on execution against, 410; time to render principal on impressment of, 420.
- Sale, *see* "*Goods sold*," "*Purchaser*;" under a *fi. fa.*, 390, 391, 398.
- Satisfactions, clerk of, 9.
- Satisfaction, of judgment, what execution is, 401, 407, 414; entry of, on the roll, 437; satisfaction piece, 437; after payment of penalty of bond, 523.
- Scandalum magnatum, change of venue in action for, 728.
- Sciendum, entry of, in the *nisi prius* record, 256.
- Scilicet, advantages of, 312.
- Scire facias, the subject matter of,  
     Nature of writ, 598; when an action, 598; when a mere continuation of suit, 598; when an interlocutory proceeding, 598.  
     *To revive a judgment after a year and a day*, 599, 374; when necessary, 599, 374; when not, 599, 374; when plaintiff prevented suing out execution, 599, 374; when execution already sued out, &c., 600, 374; consequences of want of *sci. fa.* 600; when motion for, of course or not, 600, 601.  
     *Upon the death of parties*, 601; on death after final judgment and before execution, 601 374; on death between verdict and judgment, 603; on death between interlocutory and final judgment, 604; on death of one of several plaintiffs or defendants, 604.  
     *Upon the marriage of parties*, 605; of feme plaintiff, 605; of feme defendant, 605.  
     *In case of bankruptcy or insolvency of parties*, 606; of plaintiff, 606; of defendant, 606, 607.  
     *On judgment in debt on bond*, 607, 523, 527.  
     *On a judgment quando &c.*, against an executor, &c., 608.  
     *Against bail*, 431, 434; against bail in error, 436; *see* "*Bail*."  
     *Against pledges in replevin*, 894, 609; *see* "*Replevin Bond*."  
     *Ad audiendum errores*, 365, 609. *See Addenda*.  
     *Quare executionem non*, after error, 363, 374, 609.  
     *Ad rehavendum terram*, 407, 609.  
     *Against sheriff after levy*, under a *fi. fa.*, 402, 610.  
     *To repeal letters patent*, 609.  
     *After special capias utlagatum*, 708.  
     *After pardon of outlawry*, 609.  
     *To certify sealing bill of exceptions*, 610.
- Scire facias, proceedings on,  
     *The writ*, summons, &c., 610; to whom directed, 610; when a testatum, 610; teste of, 610; return of, 611; form of must pursue the judgment, 611; what a variance, 611; must be sued out of Court in which the record is, 611; to revive a judgment, 612; when leave of Court necessary to sue out,



611, 612; form of motion for, 612; practical directions as to suing out the writ, 612; by what officer writ signed, 612; by new attorney without order for changing, 37, 38; leaving it at sheriff's office, 612; what time it must remain there, 612; sheriff to indorse on the day of leaving it, 612; summoning defendant or bail, when necessary, 612, 433; notice to him where he resides in another county, 612, 633; practice of two scire facias and nihilis discontinued, 612; if party not summoned, leave of Court necessary to obtain judgment if he does not appear, 613; mode of summoning party, 613; rule to appear and judgment after summons, 614; mode of giving party notice of sci. fa., 613; rule to appear and judgment after notice, 613, 614; judgment, &c., against two, 614; testatum sci. fa. against heir, &c., 614; amendment of writ, 849; agreement in cognovit or warrant of attorney to dispense with, 487, 488, 493, 502. *¶*

*Appearance on*, 614.

*Declaration on*, 614; not within 2 W. 4, c. 39, &c., 614; title of, 615.

*Plea, &c.*, 615; time for pleading, 615; 2 W. 4, c. 39, &c., not applicable to, 615; should be delivered, 208; demurrer book to be made up by attorney, 476; audita querela, 615.

*Issue*, 615; to be made up by attorney, 476. *See Addenda.*

*Trial, &c.*, 615; damages, 615; plaintiff may be nonsuited, 615; postea, judgment, execution, &c., 615.

*Costs*, 615; enactment of 3 & 4 W. 4, c. 42, 615; general rule as to, 616.

*Execution*, 616; same as usual, 616; in sci. fa. to revive judgment, 616; against bail on sci. fa., 616.

*Amendment in*, 849.

*Second scire facias*, 616; when necessary, &c., 616.

Scire fieri inquiry, 667, 668.

Scotland, peers of, when privileged from arrest, 65; bankrupt's certificate, &c., in, no privilege from arrest, 71; affidavit of debt sworn there, 92; commissioners empowered to take affidavits in, 904; property in, not sufficient for bail to justify, 168; error from Courts of, 331.

Sealer of the writs, 13; not to seal blank writs, &c., 13; sealing of capias, 109.

Sealing, warrant of attorney, 493.

Seamen, *see* "Sailors."

Searching office for plea before signing judgment, 202; sheriff searching for detainers, 121.

Second action, staying proceedings in, 750, 751; after nonpros, 792; after discontinuance, 795.

Second arrest, when allowed or not, 75, 76, 792.

Second deliverance, writ of, 584, 590, 594; costs on. 593.

Second trial, 826, 828, 829; *see* "New Trial."

- Secondary, 14.  
 Secondary, on the crown side, 14.  
 Secondary evidence, 245, 238, 242.  
 Security for costs, in what cases, 762; where plaintiff abroad, 762; where out of jurisdiction of Court, 762; where several plaintiffs, 762; where plaintiff an ambassador, &c., 762; in ejectment, 762, 543; will not be required where plaintiff merely insolvent, or bankrupt, &c., 763; where plaintiff convicted of felony, 763; where defendant has possessed himself of all of plaintiff's property, 763; where cestui que trust sues in name of trustee, 763, 755. How security for, obtained, 764; practical directions, 764; when application to be made, 764; affidavit for &c., 764.  
 Security to plaintiff for defendant's appearance, 125; when bail bond or attachment ordered to stand as, 147.  
 Seduction, damages in action for, 311; new trial for excessive damages in, 818.  
 Sentence of admiralty, how proved, 235; *see* "Judgment."  
 Sequestrari facias, &c., 695, 696; after outlawry, 708.  
 Serjeant, *see* "Counsel;" when privileged from being held to bail, 68; change of venue in action by, 728; exempt from being a juror, 290.  
 Servants, of Royal Family, when privileged from arrest, 65, 409; of peers, 66, 409; of ambassadors, &c., 66, 67, 409; service of declaration in ejectment on a servant, 531, 532.  
 Service of clerkship to attorney, 18.  
 Service of writ of summons, 448—451; what a good personal service, 450; of notices, &c., upon attornies—when and where, 28, 29, 155, 156; of notice to produce, &c., 244, 241; of rules generally, 29, 155, 881, 885; of summons or order, 894, 897; of rule for attachment, 934; of notice of bail, 155; of notice of declaration, 191; of declaration in ejectment, 531, 532; of rule or order to return writ, 133; or to bring in body, 136.  
 Sessions, attorney's bill for business at, must be delivered, 45; attorney cannot be clerk of peace, 32.  
 Set-off, when defendant can be held to bail for balance only, 79; general issue and notice of set off, 207; particulars of, 774, 775; amendment of, 843; particulars of, annexing to record, 257, 265, 777; particulars of, generally, 774; verdict, how taken, in case of, 308.  
 Set-off of one award or judgment of costs against another, 54, 55, 437.  
 Set-off, of attorney, when available for him, 53, 30; of agent, 28; attorney need not deliver bill for purpose of, 46.  
 Setting aside, nonsuit, 301; proceedings against the sheriff, or on the bail-bond, 142; warrant of attorney, 496; judgment, &c. on warrant of attorney, 498, 501; judgment by default, 506; judgment against casual ejector, 538; award, 918; plaintiff's own proceedings, 509.

- Setting aside proceedings for irregularity, 782; *see* "*Irregularity.*"
- Several actions, staying proceedings in, 750, 751, 544; consolidating, 544, 734.
- Several counts, payment into court in case of, 738, 741, 742, 749; damages in case of, 309; where entire verdict and bad count, 310.
- Several issues in law and fact, proceedings on, 476, 477; which best to try first, 477; judgment in demurrer in case of, 480, 481; new trial in case of several issues, 823; costs in case of, 863.
- Several plaintiffs or defendants, statement of, in affidavit of debt, 90; in writ, 102; service of writ of *capias* on one of, 121; time to declare in case of, 187, 639; when you may declare against one of several only, 188, 190; outlawry of one, 709; payment into court by one, 738; delivering issue where several defendants, 220; notice of trial to, 223; notice of trial where one suffers judgment, 226; nonsuit where one suffers judgment, 301; verdict where several defendants, how to be given, 309, 504; severing damages, 309; costs where one of several defendants acquitted, 862; judgment by default by one, 504, 510; costs on, 506; writ of inquiry in case of, 509, 510; costs where several defendants in ejectment, 550; effect of death of one of, 604, 605, 871, 979; *see* "*Death.*;" new trial in case of several defendants, 824; contribution, 309, 388; writ of error, 327, 328, 333; writ of execution, 376, 405; how far execution on one discharges rest, 401; judgment on warrant of attorney in case of death of one party, 495; *sci. fa.* in case of, 611, 614; supersedeas of prisoner where several defendants, 639, 641, 642.
- Several pleas, 208; when and how pleadable, 208, 209, *see* "*Plea.*;" costs on, 864.
- Several tenants, service, &c., of declaration in ejectment in case of, 531, 535.
- Sewers, attorney privileged from acting as officer of, 31.
- Sham plea, 203; when not allowed, 203; when plaintiff may sign judgment, 203.
- Sheriff, generally, 14.
- Deputy of, 14; to appoint one in London, 15; not to issue blank warrants, 15; not to issue warrant until writ delivered to him, 15; when to return writs, 15, 383; delaying return, &c. of writs, 15, 333; not compellable to return writ six months after office of, expired, 132, 383; extortion by, 15, 16, 387; not to take warrant of attorney from prisoner, unless in presence of attorney, 16; not to be an attorney, 16, 31, 32; nor bail, 16, 32; liability of, for arresting a peer, 66; for arresting an ambassador, &c., 67.
- Direction of writs to, 97, 378; where sheriff is a party, 97.
- When bound to discharge defendant on bail tendered, 123.
- Duty of, on taking a bail bond, 124, 125; when bound to assign bail-bond, 139; consequences of refusal, 139; how to assign, 140; consequences of assignment, 139, 140;

- action by him on bond, 142; how reimbursed if he has to pay debt, &c., 148, 149; amount of liability when he is fixed, 148;
- Court will not relieve, when guilty of breach of duty, 148.
- Award of venire, where sheriff a party, &c., 869, 216, 217.
- How to execute writs of execution generally, 379, 385, *see* "*Execution*;" how to execute, and duty on a *fi. fa.*, 390, —399, *see* "*Fi. Fa.*;" how to execute, and duty, &c., on an *elegit*, 403, *see* "*Elegit*;" how to execute, and duty, &c., on a *ca. sa.*, 411, *see* "*Capias ad Satisfaciendum*;" his poundage and expenses on writ of execution, 385; remedy for, 387; how to act on adverse claims, 756; payment to him under an execution, 399, 412; acquires special property in goods seized, 402; remedy against, for amount levied in execution, 402.
- Writ of inquiry executed before, &c., 513, *see* "*Inquiry, writ of*;" writ of inquiry in debt or bond executed before, 523; new trial, where under-sheriff was party's attorney, 817.
- Trial of actions not exceeding 20*l.*, before sheriff, 286 *b*; new trial where under-sheriff was party's attorney, 817.
- His duties, &c., in replevin, 579; his liability in and proceedings against, 597.
- Relief of, &c., in case of adverse claims on execution, &c., 757.
- Sheriff, proceedings against him after arrest of defendant on *mésne* process.
- Rule or order to return the writ*, 131; in what cases, 131; proceedings should keep pace with time allowed for putting in &c., bail, 132; when plaintiff cannot proceed against sheriff, 132; cannot be compelled to return writ, &c., without rule or order, 132; must be ruled, &c., while in office, or six months afterwards, 132; when rule or order obtained, 132; how obtained, 132, 433; what a compliance with the rule or order, 133; within what time the sheriff must return writ, 133; what return he should make, 133, 134; attachment for not returning, 134; when and how obtained, 134.
- Rule to bring in the body*, 135; in what cases, 135; when and how obtained, 135; must be no laches, 135; ruling late sheriff, 136; how served, 136; how complied with, 136; in what time, 136; when contempt for non-compliance purged, 136; by render, 136; compliance with, in case of death, 136; by insanity, illness, &c., 136; by injunction, 136; mode in which sheriff to bring in the body, &c., 136; attachment for not returning, 137; when and how obtained, 137.
- The Attachment*, 138; what, 138; when to be moved for, 143, 137; proceedings upon it, 138.
- Setting aside the proceedings against sheriff for irregularity*, 142;

- with costs, 142; where proceedings relative to bail irregular, 142; where attachment pending summons to stay, 142; where arrest by special bailiff, 142; irregularity in assignment by bond, 143; or in action thereon, 143; where writ void, 143; where bail-bond defective, 143; for other causes, 143; mistake of attorney in putting in bail, &c., 144; taking a cognovit, 144; unnecessary laches in proceedings against sheriff, 144; injunction, 144; death of defendant, 145; death of plaintiff, 145; bankruptcy of defendant, 145; defendant an alien, 146; defendant's attorney not having taken out certificate, 146; where defendant arrested in two counties, 146; not necessary to put in bail, where proceedings are irregular, or against good faith, 146.
- Staying regular proceedings upon payment of costs*, 146; power to stay, given by statute, 146; terms on which proceedings stayed, 146; loss of trial, 146; attachment or bond standing as a security, 146, 147; affidavit of merits, &c., 147; for actual directions, 147; when application to be made, 148; court will never relieve, where sheriff guilty of a breach of duty, 148; consequences if proceedings be not stayed or set aside, 148; what sheriff must pay, 148; how reimbursed, 148; action for money paid, 149.
- Action, &c. against*, for escape, 134; for false return, 134; for false imprisonment, 69, 71, 113, 101, 128; for not returning writ, 121; for not assigning bond, 139; for amount levied in execution, 402; for extortion, 128, 387.
- Sheriff, proceedings against prisoners in custody of, &c., 644; see "*Prisoners.*"
- Shewing cause against rules, generally, 883.
- Ship, notice of trial on master of, 223; register of, proof of, 237; articles of, evidence, &c., 245.
- Short notice of trial, what, &c., 224, 201.
- Sicut alias distringas, &c., 581.
- Side bar rules, 892.
- Signer of bills of Middlesex, 13; what writs to be issued by, 13; to state on writ day of signing it, 106; signing of capias, 109.
- Signer of the writs, 13; what writs to be issued by, 13; to state on writ, day of signing it, 106; signing of capias, 109.
- Signing pleas, what must be signed, 207; signing replication, &c., 212; signing demurrer, &c. 475; forging counsel's signature, 41.
- Similiter, striking out and demurring, &c. 219, 477; when plaintiff may add, 219; amendment to insert it, 841, 842; consequences of want of, 843.
- Sittings in banc, 58; in bail court, 59; at Nisi Prius, 61, 271; considered but as one day, 603; notice of trial for, 224; time appointed for trial of common or undefended causes, 271.
- Slander, verdict in action for, where one bad count, 310; change

- of venue in, 727, 728; damages in, 311; new trial for excessive damages in, 818; costs on, 858; *see* "Case."
- Soldiers, privilege from arrest, 73, 409; how proceeded against, 74; affidavit, &c., on execution against, 410.
- Solvit ad diem, plea of, must be delivered, 204, 207; need not be signed, 207; damages on, 307; *see* "Deed," and the *Addenda*.
- Son assault demesne, plea of, need not be signed, 207.
- Southampton, direction of writs to, 98.
- Southwark, direction of writ into, 98.
- Special bail. *See* "Bail, Special."
- Special bailiff, 112, 383.
- Special capias utlagatum, 707.
- Special case, 305; form of, and proceedings, &c. on, 305, 306; amendment of, 306, 847; attorney preparing false one, guilty of contempt, 41; proceedings on a special case reserved without proceeding to trial, 467; proceedings on case stated from court of equity, 468.
- Special demurrer, 200, 475; in abatement, 472; *see* "Demurrer."
- Special execution, not warranted by general judgment, 377.
- Special imparlance, 588. *See* *Addenda*.
- Special jury, how returned, 260, 261; costs of, 260, 262; judge's certificate for, 260; in case of a nonsuit, 261; practical directions as to, 261; proceedings on non-appearance of special jurors, 262; tales, 263; proceedings where special jury obtained for delay, 263; qualifications of, 291.
- Special paper, demurrer set down in, 479.
- Special pleas, 208, *see* "Plea;" the like in error, 350.
- Special verdict, 303; form of, and proceedings on, 303, 304; amendment of, 305, 847; judgment and execution on, 305.
- Specialty, *see* "Covenant," "Debt."
- Stamp, on articles of clerkship, 17, 21; on attorney's certificate, 23; compelling production of instrument to get stamped, 771; trying cause out of turn to get instrument stamped, 272; stamp on cognovit or warrant of attorney, and consequences of want of, 488, 492; when payment into court admits sufficiency of stamp, 741.
- Stannaries, error from court of, 331.
- State, acts of, how proved, 238.
- Statutes, *see* the *Chronological Table of, at commencement of* Vol. 1.
- Statute of frauds, retainer of attorney when within, 33; undertaking of attorney, though within it, enforceable, 39, 126.
- Statute of limitations, *see* "Limitation."
- Statutes of jeofails, *see* "Jeofails."
- Statutes penal, *see* "Penal Statute," "Penalty;" public, how proved, 229; private statutes, how proved, 229; costs in actions on, 855, 861.
- Staying proceedings.
- Upon payment of debt, &c., and costs, 745; within four days after arrest, or service of writ, 745, 108; when account disputed, how to act, 745, 736, 737, 739; summons on that*

- occasion, 745; when proceedings stayed without costs, 745, 746; in what cases in general, proceedings may be so stayed, 746; in assumpsit, 746; in actions on bills, &c., 746; acceptor made to pay the costs of all actions on the bill, when, 746; when not, 746; in debt, 747; in debt on bond, 747, 523; in debt on mortgage bond, 747; in debt on bail bond, 146; in debt on judgment, 747; in debt on recognizance of bail, 415; in debt on statute, 748; in covenant, 748; in trespass, 748; in case, 748; in trover, on delivery up of goods, &c., 748; in replevin on payment of rent, &c., 748, 591; on payment of costs and expences of replevying, 749; in ejectment for non-payment of rent, &c., 749, 562, 543; where several counts, 749; practical directions to obtain the stay of proceedings, 750; costs on, 750.
- In second actions for the same cause*, 750; in ejectment, &c., 750; in other actions, 750; second action must be for same cause, and between same parties, &c., 751; after consolidation rule, 751; in action against hundred, 751; after a former recovery, 752; where several wrong doers, 752; proceedings when second action stayed, 752; costs, 752.
- In trifling actions*, 752; where claim under 40s., 752; it must appear that it is so, 752; where claim not recoverable elsewhere, 753; where claim recoverable in a court of requests 753; in action of trover, &c., 753; in what time the application should be made, 753; when a rule nisi only, 753.
- In actions pending error, &c.*, in action on the judgment pending error, 753, 338; staying execution upon original judgment pending error, 753, 337, 339; staying proceedings against bail pending error, 753.
- Pending rule nisi, &c.*, 763, 782, 883; pending a summons, 894; pending order for particulars, 774, 775; time allowed for next step after, 143, 196; motion to operate as stay of proceedings, not to be made on last day of term, 775.
- In proceedings against bail*, bail to sheriff, 152; bail to action, 415, 416; against bail pending error, 434; against sheriff or on bail bond, 146; see "*Bail Bond*," "*Sheriff, proceedings against*."
- Where adverse claims*, 756; see "*Adverse claims*."
- In actions by common informers*, for penalties, 754.
- Where plaintiff has admitted action not maintainable, &c.*, 754; where action brought by defendant against plaintiff, and defendant indebted to plaintiff in a larger sum, 754, 308.
- Where action brought against good faith, or pending a reference*, 754.
- Where action brought without authority or without plaintiff's consent*, 754, 755, 544, 38.
- After indictment for perjury, or fraud, &c.*, 755.
- After outlawry*, 755.
- In action against bankrupt after certificate obtained by him*, 755, 688.

- Sterling money, statement of value of, in affidavit of debt, 87.
- Stet processus, when allowed, on motion for judgment as in case of nonsuit, 809.
- Steward, attorney acting as, lien of, 30.
- Sticking up notice of declaration in office, 191; demand of plea, 198.
- Stipulated damages, *see* "*Liquidated Damages.*"
- Stock, interest on, bond for replacing, allowed in error, 355; bond for replacing not within 8 & 9 W. 3, c. 11, 522.
- Stock-jobbing not allowed to be pleaded with other pleas, 209.
- Striking attorney off roll, 40, 43, 44.
- Striking out counts, 732, 733, 189; pleas, &c., 733, 210; indecent matter, &c. 733; similiter and demurring, 219, 221, 477; notice of, 221; striking out plea, &c. on judgment for want of a rejoinder, 505.
- Submission to arbitration, 906; *see* "*Arbitration.*"
- Subornation of perjury by an attorney, how punished, 43.
- Subpœna, 245; subpœna duces tecum, 246; 238; on writ of inquiry, 517; penalty for not obeying, 246; attachment, &c. for, 246.
- Subscribing witness, 239, 242.
- Suggestions, entry of, upon the roll.  
*Generally*, 869; when copy of, should be delivered to opposite party, 817, 870; should be made at proper stage of proceedings, 870.  
*As to the awarding of the venire*, 869, 216; where sheriff interested, 869, 216; in local action under 3 & 4 W. 4, c. 42, s. 22, 869; in local action, where impartial trial cannot be had, 869, 217; where venire laid in city or town corporate, 869, 217; where venue in Berwick upon Tweed, 869, 217; where venue in county palatine, 870, 218.
- Of breaches in debt on bond*, 218, 522, 524.
- Of distress, &c., for rent in replevin*, 585.
- Of the death of parties*, 871; of death of one of several plaintiffs 871, 405, 602.
- Of the death or removal, &c., of assignee bankrupt*, in action by, 683.
- For costs*, 871; in general, 871; where action should have been brought in court of requests, &c., 872; general construction of court of requests acts, 872, 873; when to plead instead of suggest, 872; practical directions as to entry of suggestion, 873; suggestion may be traversed, &c., 873; to what causes of action the court of conscience acts extend, 873; cause of action and residence of parties should be within the jurisdiction, 874; what persons not within the acts, as executors, attornies, &c., 874; suggestions for double costs &c., 874; where plaintiff does not recover sum for which he held defendant to bail, 875.
- Sum, for what, defendant may be arrested, 78; statement of, in af-



fidavit on a bill, &c., 87; to be stated on *capias*, 106, 107; on summons, 447; for what bail liable, 415.

Summing up at trial, 282.

Summons and orders.

*Summons*, when to be obtained, 894; power of judges to grant order, 894; practical directions how to take out summons, 894; service of, 894; when a stay of proceedings, 894; proceedings on, 896; consenting to an order, 896; indorsing consent, &c., 896; attending judge to obtain order, 896, 897; hours, &c., of judges' attendance, 62; order, 897; drawing up and service of order, 897; costs, 897; attachment for disobedience of, 931; setting aside or rescinding order, 897; one judge will not interfere with another's order, 172; for an attorney to deliver up writings, &c., 31; for charging the attorney in the cause, 36; to oblige an attorney to deliver his bill, 48; that attorney's bill be referred to be taxed, 50; to discharge a seaman or soldier arrested, 74; to discharge<sup>d</sup> certificated bankrupt, 70, 116, 689; to discharge defendant, on entering a common appearance, 93; that the sheriff return the writ, 133; that the sheriff bring in the body, 135; to cancel a bail bond, 93; for time to put in bail, 152; for leave to add bail, 161; for time to justify, 171; for leave to inquire after the bail, 173; to stay proceedings upon bail bond, 146; for time to declare, 187; for further time to plead, 199; to plead several matters not enumerated in the rule of T. T. 1831, 209; to waive pleas, &c., 211; for leave to try the action before the sheriff where the debt does not exceed 20*l.*, 286; for leave to try the cause in another county, 216, 869; to put off trial, 798; to produce books, papers, &c., at the trial, 238, 771; for leave to enter suggestions on issue, where by mistake issue has been delivered without them, 526; to refer it to master to compute principal and interest on bill of exchange, in vacation, 520; for leave to charge a prisoner in custody on a criminal account with a civil action, 638, 639; to discharge a prisoner upon *supersedeas*, 652; to reverse an outlawry in nonbailable actions, 711; to consolidate actions upon policies of insurance, 735; to stay proceedings on payment of debt and costs, 745; for relief by persons not sheriffs against adverse claims, 756; for copies of written instruments, 769; for opposite party to admit documents stated in pleadings, 238; for particulars of demand, set-off, &c., 774; for the sheriff to return a good jury upon a writ of inquiry, 514; for leave to amend, 831; in vacation for leave to issue a *scire facias* to revive a judgment of more than ten, and not more than fifteen years old, 500; to revoke an arbitrator's authority, 909, 910; to enlarge the time for arbitrator making award, 915; to examine witness on interrogatories, &c., 251, 252.

*Orders granted without summons*, order that defendant may be holden to bail, in trover, &c., 82; that plaintiff may issue a distringas to compel appearance of, or to outlaw defendant, 462; that plaintiff may sue in forma pauperis, 697; that unless an infant defendant appear, John Doe may be assigned as his guardian, and a common appearance be entered for him, 676; to compel an attendance of witness or production of documents, before an arbitrator, 913.

Summons, writ of.

*In what cases &c., by and against whom issued*, 441; the means for commencing a personal action, 441; lies by or against any person, 441; may be used for outlawry, 441.

*Form of the writ*, 441; statute requires it, imperatively, 442.

*Direction of, and parties' names*, 442; directed to defendant, 442; misnomer of defendant, 442; how cured, 442; when cannot be, 443; defendant's residence, 443; misnomer of plaintiff, 443; describing parties, &c. in representative character, 443, 444; addition of parties unnecessary, 444.

*Number of parties*, 444; all names should be inserted, 444; when insertion of too many defendants may be cured, 444; nominal defendant's name how omitted, 444.

*Cause of action*, 444; consequences of omission of, 444; consequence of variance between, and declaration, 444.

*Return of*, 445; no particular return day specified, 445; when defendant to appear on, 445: where to appear, 445.

*Date of Teste of*, 445; should be dated on day of issuing, although in vacation, 445; mistake in date or king's name, &c., 445, 446; writ must not be issued until complete cause of action, 446; must be tested in name of chief justice, &c. 446.

*Duration of*, 446; remains in force four calendar months, 446.

*Memorandum to be subscribed*, 446.

*Indorsements on*, 446: of name, &c. of plaintiff's attorney, &c., 446; of name, &c. of plaintiff suing in person, 447; omission, &c. of, 447; demand on attorney to declare abode, &c. of plaintiff, 447; indorsement of amount of debt and costs, 447; taxing costs, &c., 447; consequences of omission of, 447, 448; indorsement of day of service of writ, 448; when to be made, &c. 448.

*How sued out*, 448; practical directions as to, 448.

*Service of*, 448; in England or Wales, 448; in county, &c. in which defendant is described in writ, or 200 yards of border, 448; in districts parcel of one county, but situate in another, 449, 97; where boundaries disputed, 449; application to be set aside, 449, cannot be served on defendant attending a trial, &c., 449; or in other cases of temporary privilege, 449; service must be within four months of date of writ, 449; may be at night, 449; not on Sunday, 449; may be served by attorney, &c., 449; copy

- of writ should be served, 449; service must be personal, 450; what a sufficient service, 450; service on corporations, hundredors, &c., 450; not necessary to shew the writ, 448, 450; unless demanded, 450; indorsement of day of service, 450; irregularity in service, when and how taken advantage of, 451; notice not to appear to writ, 450.
- Alias pluries and other writs after it, if not served*, 451; form of them, 451; how sued out, &c. 451; *distringas*, 451.
- Defects in, how and when taken advantage of*, 452; when court will set aside, 452, 451; when application for, to be made, 452; notice not to appear to, 452.
- Amendment of*, 452; when allowed, 452; costs on, 453; re-sealing writ, 453.
- Appearance on*, 453; in what time to be made, 453; when may be entered by plaintiff for defendant, 453; affidavit for, 454; practical directions as to entering, 454; form of, 454.
- Declaration and subsequent proceedings*, 454.
- Summons and *distringas*, proceedings by, 456; see "*Distringas*."
- Summons on a *scire facias*, 612, 613, 433; if not made, leave of court to sign judgment requisite, 613, 433.
- Summons and severance after error brought, 328.
- Summons of jury, on writ of inquiry, 517; on trial at *nisi prius*, 259; on trial before the sheriff, 286 c.
- Sunday, when first day of term, 56; when reckoned in proceedings, 58, 160, 197; not reckoned as one of the days for *sci. fa.* lying in sheriff's office, 612; nor for *ca. sa.* to fix bail, 432; defendant cannot be detained, &c. in custody on illegal arrest on, 77; arrest cannot be made on, 119; unless after negligent escape, 129; writ cannot be served on, 449; service of declaration in ejectment on, bad, 534; service of rule on, bad, 881; attachment cannot be executed on, 934; bail may seize principal on, 423; execution cannot be executed on, 380.
- Superfluous counts, &c. striking out, &c. 732, 733, 189.
- Supersedeas generally, for prisoner for not declaring, 638, 649; for not proceeding to trial or judgment, 641, 649; for not charging in execution, 642, 650; what matters will prevent, 650; lists of prisoners supersedeable, 651; notice to marshall, &c., of grounds for preventing, 651; prisoner supersedeable for one month, to be superseded, 651, 652; how supersedeas obtained, 652; practical directions, 652, 653; effect of supersedeas, 653; once supersedeable always so, 651, 653; that rule considered, 651; *ca. sa.* after judgment, 653; how far a supersedeas after judgment discharges it, 653, 77, 78; arrest after, 653; on allowance of bail to get defendant out of custody, 174, 179; supersedeas of outlawry, 705; when a writ of error is a supersedeas of execution, 336, 337, 358; writ of second deliverance, a supersedeas of *retorno habendo*, 584, 593.
- Supplementary affidavit of debt, not allowed, 95; when allowed in other cases, 882, 884.
- Surety, see "*Bail*," in *replevin*, 578, 595, see "*Replevin Bond*;"

- surety becoming a witness, 578; cannot arrest principal until damnified, &c., 79.  
 Surgeon, exempt from being juror, 290.  
 Surname, *see* "*Names*."  
 Surprise, time for plaintiff to inquire as to bail after, 173; term's notice to prevent, *see* "*Term's Notice*;" new trial, in case of verdict, &c. by, 821, 827.  
 Surrebutter, 213.  
 Surrejoinder, &c., 213.  
 Surrender by bail, *see* "*Render*;" of copyhold, proof of, 235; *see* "*Copyhold*."  
 Surveys, how proved, 237.  
 Survivorship, *see* "*Death*."  
 Suspension, of cause, *see* "*Injunction*," "*Laches*," "*Term's Notice*;" of trial, 273.

## T.

- Tales, 274, 263, 270.  
 Tam quam, writ of error, 332, 336.  
 Tarde, return of, &c., 581.  
 Taxation of costs, 320, *see* "*Costs*;" of attorney's bill, 48; costs of taxation, 51.  
 Taxes, to be paid in case of execution, 398.  
 Temporary privilege from arrest, 113—118.  
 Tenant, *see* "*Ejectment*," "*Landlord*;" in tail, error by, 326; collusion by, against landlord in ejectment, 538, 539; bound to give landlord notice of ejectment, 541; ejectment by landlord against, 559, 563, 568.  
 Tenant in common, service of declaration in ejectment on, 531; consent rule in ejectment by, 539.  
 Tender, need not be negatived in affidavit of debt, 90; where best not to plead it, 736; plea of, is issuable, 200; not allowed to be pleaded with general issue to whole declaration, 208; payment of money into court, on plea of, 744; judgment for not paying, 204; nonsuit after, 301; of witnesses' expenses, 249; of rent, &c., in ejectment, 562, 749; of amends in actions against justices, officers, &c. 693; of amends in involuntary trespasses, 744; in replevin, 744.  
 Term, 56; commencement and duration of, 56; essoign day of, 56; returns in, 57; holidays, 7, 8; sittings in banc, and bail court, 58—61; sittings at nisi prius in and after, 61; attendance at chambers, 82; party cannot be compelled to take more than one step in, 214; term of which judgment on warrant of attorney to be entered up, 498.  
 Term's notice to plead, 195; to reply, rejoin, &c., 212; to enter issue, 222; to move for judgment as in case of a nonsuit, 808; term's notice of trial, 227; of inquiry, 515; of motion, 883; of signing judgment, 318; necessary only before verdict, and not as to proceedings after it, 317.

- Term of years, &c., sale of, under fi. fa., 391; extending, &c. of, on elegit, 404.
- Terms on granting time to plead, &c., 200.
- Terre tenants, elegit against, 403; scire facias and execution against after death of defendant after final judgment, 601, 602, 879; the like, after death between verdict and judgment, 503, 878; the like, after death between interlocutory and final judgment, 604, 879; the like, on death of one of several defendants, 605, 879.
- Terriers, how proved, 237.
- Teste of writs, *see the different titles of Writs.*
- Testatum, fi. fa., 389; elegit, 403; ca. sa. 409; sci. fa. 610, 614.
- Thanksgiving day, when reckoned in proceedings, 58, 160, 197.
- Third arrest, never allowed, 77.
- Threatening letter, attorney sending, 41; threatening bail, costs, &c., after, 171, 172; attachment for threatening prosecutor, &c. 933; plea of per minas need not be signed, 207.
- Time, computation of, 59; for putting in bail, 151, 171, 176, 179; to inquire after bail, 173; for pleading, 194, 195; further time for pleading, 199; when and how obtained, 199; upon what terms, 200; for signing judgment for want of plea, 202; for replying, 211, 212; for making up issue or paper book, 219; further time for, 222; for giving notice of trial, &c., 223, 225, 226, 227.
- Tipstaff, 14.
- Tithing-man, *see "Constable."*
- Title, of affidavit, 82, 899; of declaration, 189; of issue or paper book, 214, 215; of notice of trial, 225.
- Title deeds, not seizable in execution, 392.
- Tombstone, examined copy of inscription on, 237.
- Tower of London, officers of, when privileged from arrest, 65; execution in, not allowed, 382.
- Towns, direction of writs into, 97, 98.
- Trade, things fixed for, seizable, &c., under fi. fa., 392.
- Tradesman's books, proof by entries in, 243.
- Trainbearer, 14.
- Transcript, rule to transcribe, 346, 359, 362; not necessary, *see Addenda*; nonpros for not transcribing, 346; when and by whom made out, &c., 346, 359, 362; in what cases amended, 347; when necessary to remit it to court below, before execution sued out, 357.
- Transmitting bail piece, 177.
- Treasurer of company, execution against, 378.
- Treasury, clerk of the, 10; attendance at, 11; bespeaking of record at, 483.
- Treble costs, *see "Double Costs."*
- Treble damages, 313.
- Trepass, jurisdiction of the court in, 1; arrest in, when allowed, 82; payment into court in, 737; staying proceedings on payment of damages, &c. 748; damages in, 307, 309, 310, 313;

for mesne profits, 571; judgment in, 320; judgment by default in, interlocutory, 504, 505; writ of inquiry in, 509; proof of damages in execution of writ of inquiry in, 518; costs in, 856, 858; execution in, 377.

Trial, notice of.

What notice necessary, 223; in town causes, 223; in country causes, 224; short notice, what, 224; notice in all cases necessary, 224; where fresh notice requisite, 224; when must be given, 225, 223, 213; may be given on pleading concluding to country, 225; effect of, 225; must be given before nine at night, 225; to whom to be given, 225, 213; form of, 225; on back of issue or separate paper, 225; one of several defendants suffering judgment by default, 226; consequences of defect, &c., in notice, 226, 224, 225; or in service of, 226; notice by continuance, 226; term's notice, when requisite or not, 227; notice of countermand, 227; consequence of not countermanding in time, 228; new notice of trial, when requisite or not, 228.

Trial, jury process for, 257; see "*Jury Process.*"

Trial, entry of cause for, 265; see "*Entry of Cause for Trial.*"

Trial at bar, 268; in what cases granted, 268; when moved for, 269; notice of trial, &c., 269; jury, 270; trial, 270.

Trial at Nisi Prius.

Order in which causes are tried, 271; limitation of sittings, 271; time for trial of common actions on bills, &c., or undefended causes, 271; lists of causes, 272; such lists deemed notice of day of trial, 272; when court will try cause out of order, 272; when court will suspend trial, 273; judge not bound to try a wager founded on boxing match, &c. 273; consequence of attornies and counsel not being ready for trial, 273; withdrawing record, 273; abstract of record usually delivered to judge, 273; jury called and sworn, 273; challenges, 274; tales, 274; case stated and evidence, 275; who to begin, 275; order of hearing, &c., counsel for plaintiff, 276; calling and examining witnesses, 277; leading questions not to be put to witness, 277; when to object to witness for incompetency, &c., 278; proof of incompetency, 278; bad character of witness, 278; witness to speak only to facts in his own knowledge, 279; when may refresh his memory, 279; opinion of witnesses, 279; disproving testimony of facts from witness, 279; examining witnesses separately, 280; suffering witness to remain in court, 280; cross-examination of witness, 280; re-examination, 280; plaintiff should take care to adapt evidence to nature of issue, 280; when plaintiff cannot call fresh evidence, 280, 281; or recall witness, 281; the defence and evidence, 281; the reply, 281; the summing up, 282; how done, 282; withdraw-

- ing a juror, 282; plea puis darrein continuance, 283; bill of exceptions, 283; demurrer to evidence, 283; nonsuit, 283; verdict, 283; see "*Verdict*;" proof of trial, 230.
- Trial before the Sheriff, &c.  
Statute of 3 & 4 W. 4, c. 42 as to, 286 *b*; practical directions as to, 286 *c*; proceedings after, 286 *d*.
- Trial lost, in what cases, 146, 147.
- Trial by proviso, 801; see "*Proviso*."
- Trial, on plea of abatement, 473; who to begin on, 276.
- Trial, in ejectment, 547, 567; in replevin, 591; in scire facias, 615; in actions against prisoners, 641, 645, see "*Prisoner*."
- Trial, upon nul tiel record pleaded, 483.
- Trial, putting off, 797, see "*Putting off the Trial*."
- Trial, costs for not proceeding to, 803; in what cases, 803; how obtained, &c., 803; practical directions, &c., 804; subsequent proceedings, 804; discharging rule for, 804.
- Trial, new, see "*New trial*."
- Trifling actions, to what amount court will hold cognizance, 752; staying proceedings in, 752; new trial in, 818, 819.
- Trover, arrest in, when allowed, 82; affidavit of debt in, 85, 90; payment into court in, 737; staying proceedings on restoring goods, &c. 748; notice to produce in, 244; damages in, 311, 307; judgment in, 320; execution in, 377; sheriff may maintain, 402.
- Trustee, attorney holding papers as, 30; co-plaintiff fraudulently releasing, 286, *n*.; security for costs, &c., when action in name of, without consent, &c. 760, 755; relation of judgment as to trust estate, 321; seizing goods of, on marriage settlement, 393; extending trust estate, 405.
- Turnkey of prison, delivery of papers, &c., to for prisoner, 640, 641, 642, 645; duties, &c., of, 647, 648; turnkey of marshal not to be an articulated clerk, &c., 17; remedy for misconduct of, 130.
- Turnpike road, execution against clerk of, 378.

## U.

- Umpirage, 915, see "*Arbitration*."
- Undefended causes, list, &c., and time for trial of, 271, 272; suspending trial of, 273; nonsuit in, 301.
- Under sheriff, attorney cannot be, 32, 16; duties and disabilities, 15, 16; see "*Sheriff*."
- Undertaking, of an attorney, 35, 38, 125; when enforceable, 39, 125; of a third person for defendant's appearance, &c., 125; to pay attorney's claim against third person, 33; to give material evidence on bringing back venue, 729, 730; on discharging rule for judgment as in case of a nonsuit, 808, 809.
- Unliquidated damages, see "*Liquidated Damages*."

- Unnecessary counts, &c., see "*Striking out, &c.*"  
 Use and occupation, affidavit of debt for, 88; inquiry in, after judgment by default, 511.  
 Usher of the court, 11.  
 Usury, warrant of attorney set aside for, 496.

## V.

- Vacant possession, what is, 556; ejectment on, 556, see "*Ejectment*;" when owner may enter on, 556, 529.  
 Vacations, sittings in, 59, 61; venire facias, may be returned in, 258; writs on mesne process may be tested in, 185, 445; so may writs of execution, 379; judgment by default may be signed in, 505.  
 Variance, between writ and affidavit of debt, 94, 425; between affidavit of debt and declaration, &c., 90, 94, 426; between writ and declaration, in bailable cases, 110, 425, 426; in non-bailable cases, 444; between the issue and declaration, &c., 220, 821; between the writ of error and the record, 331; amendment of, at Nisi Prius, 231, 232; amendment of nisi prius record on, 256.  
 Venditioni exponas, writ of, 400; execution of, &c., 400, 401: on special capias utlagatum, 708.  
 Vendor and purchaser, see "*Goods Sold*," "*Purchasers*;" affidavit of debt by, on sale of estate, 86; particulars of defects of title, &c., in action by vendee against vendor, 773.  
 Venire, 257, see "*Jury Process*."  
 Venire de novo, 828, 264, 265.  
 Venue, in action on bail bond, 142; in a sci. fa. 610; in actions against attorneys and officers, 31, 630, 632; in actions against justices, officers, &c. 693.  
 Venue, change of.  
     *How and in what cases*, 726; local actions, 726, 729, 217; transitory actions, 726; motion for, in term, 726; summons for, in vacation, 726; when application may be made, 726, 727; affidavit for, 726; in what actions the venue cannot be changed, in general, 727; in actions for damages, &c., 727; in actions on specialties, or written instruments, &c., 727; where one defendant suffers judgment by default, 728; in actions by and against barristers, attorneys, &c., 728; where impartial trial cannot be had, 728; where expense of witnesses, &c., greatly preponderates, 728; other special circumstances, 728.  
     *Into what counties*, 729; in assize cases, 729.  
     *How and in what cases brought back*, 729; on plaintiff's undertaking to give material evidence, &c., 729; mode of and time for making the application, 729; nonsuit of plaintiff for not giving material evidence, 730; what sufficient ma-



- terial evidence, 730; when the Court will dispense with the undertaking, 730.
- In what cases changed by plaintiff*, 731; in transitory actions, 731; amendment of declaration, 731; in local actions, 731, 217.
- Verdict**, generally, 283; how jury must be kept till they deliver it, 283; how they may deliberate, &c., 284; consequence of irregularity in this respect, &c., 285; how delivered by jury, 285; verdict against evidence, 285; jury not allowed to give verdict on their own knowledge, 285; writ of attain for false verdict abolished, 286; consequences of false verdict, 286; general verdict, 302, 285; form of, 302, 303; must comprehend whole issue, 303; special verdict, 303, 285; public verdict, 285; *provy* verdict, 285; general verdict, subject to a special case, 305; proceedings upon it, 306; care to be taken not to enter up verdict on a bad count, 310; damages given on, 307, *see* "*Damages*;" *postea*, 314, *see* "*Postea*;" setting aside verdict for error in panel or *distringas*, 294; for misconduct of jurors, 285; for want of regular notice of trial, 225, 226; what defects cured by, 834, &c.; amendment of, 846, *see* "*Amendment*."
- Verdict in ejectment**, 547, 548, 549; in replevin, 592; in actions against executors, 665, 287.
- Verdict taken subject to an award**, 929; award of, 920.
- Vexatious arrest**, when not allowed, 75, 76; vexatious action, staying proceedings in, 746, 752, 751; new trial in vexatious action not granted, 818.
- Viccomes non misit breve**, continuances by, 258; no longer requisite, *see Addenda*.
- View**, how and in what cases, 263; practical directions, 264; jury on, how called and sworn, 274.
- Void writ**, amendment of, not allowed, 111, 837; defect in, not waived, 110; purchaser under sale under, gains no title, 398; part of void warrant held good, 497; so, of an award, 920, 923. execution without a *sci. fa.* not void but voidable, 600.
- Voluntary escape**, 128, 411; *see* "*Escape*."

## W.

- Wager**, when judge not bound to try cause pending on, 273.
- Wages**, affidavit of debt for, 88, 89.
- Waiver of privilege**, by attorney or officer of Court, 629, 631.
- Waiver of irregularity**, &c., in affidavit of debt, 94, 782; in writ, &c., 110, 783; of special bail, 159; in appearance, 783; in declaration, 185, 192, 783; of demand of plea, 198; of irregular plea, &c., 204, 205, 783; of irregularity, &c. in plea in abatement, 471, 472; in issue, not agreeing with declaration, &c., 220, 784; in notice of trial, 226, 784; in service of rule nisi, 883;

- in judgment by attending taxation, 319, 506, 784; of superseas by prisoner, 784, 638; of irregularity, &c. in attending an arbitrator, 923; a *nullity* cannot be waived, 784, 472.
- Waiver, of costs, to obtain speedy execution, 320 *a*; of lien, by seizing goods in execution, 392; of judgment by default, 507.
- Waiver of woman in outlawry, 680, 702.
- Wales, attornies, &c. of courts of, may be admitted in superior courts, 17; amount for which party may be arrested in, 78; affidavit to hold to bail in, 78; directions of writs to sheriffs in, 97; in what cases venire directed to the sheriff of an adjoining English county, 217.
- Warning on writ of *capias*, 96, 106.
- Warrant to sue or defend, 32, 33; when to be filed and entered, 33; not to be entered on distinct rolls, 222, *n.*; see *the New Rules in Addenda*; memorandum of it, 35; how long it continues in force, 37; want of it assigned as error, 34; want of, in what cases aided after verdict, 34, 359, 360, 835; see "*Addenda*;" amendment of, 835.
- Warrant of sheriff, in general, 15; on a *capias*, 111; form of warrant, 112; when to be made, 113, 383; on *capias*, how executed, 112, 113; on final process, how made, 390, 410; how executed, 380, 390, 411; showing of, 382; not to be executed unless made out, 113, 383; on a *distringas* in nonbailable actions, 461.
- Warrant upon an attachment, 138.
- Warrant of attorney, to confess judgment.
- What, 492; when not so preferable a security as a *cognovit*, 486, *n. (a)*; stamp on, 492; consequences of want, &c., of, 492; one partner cannot bind other by, 492; given by one executor, 497; by infant, 497; by married woman, 497; attorney to write defeazance, &c., on, 492; consequences of want of such defeazance, 492; clause to dispense with *scire facias*, &c., 493; release of errors, 492, 501.
- How executed, 493, 16; attesting witness, &c., 493; when defendant a prisoner, attorney for him should attest, 493.
- How far revocable, &c., 493; death of party, when a revocation, 495; marriage, 495.
- When ordered to be given up, 496; when obtained by fraud, 494; usury, 496; gambling, 496; defrauding creditors, 496; prostitution, 496; charging ecclesiastical benefice, 496; securing void annuity, 496; securing attorney's future costs, 496, 53; when Court will direct issue to try, 496; when alleged to be forged, 496; alteration of warrant, 496; when given by infant, 497; by married woman, 497; by one of several executors, 497; when good in part only, 497; costs on application, 497.
- When filed, &c., 497; consequences of not filing, in cases of bankruptcy, 497; or insolvency, 497.
- Judgment on, when to be signed, &c., 498; when given as in-

- demnity, 498; when demand necessary, 498; of what term to be signed, 498; after a year and a day, leave of Court necessary, 498; how such leave obtained, 498; swearing as to defendants being alive, 499; attesting witness's oath &c., 499; compelling his attendance 500; statement of consideration, &c. in affidavit, 500; when only a rule nisi granted, 500.
- Judgment on, how signed, &c., 500; practical directions, 500; warrant must be filed, &c., with clerk of dockets, 500; prudent to docket judgment immediately, 501; form of declaration in, 501; form of the judgment, 501; in case of joint warrant, &c., 501; where a misnomer, 501; quashing writ of error on, 501.
- Execution on, 501; when issuable, 501; for what amount 501; consequences of excess in, 501, 502; when warrant given as indemnity, 502; demand when necessary, 502; execution in case of bankruptcy or insolvency, 395, 502; when scire facias not necessary before issuing, 502, 498.
- Warrant to distrain, 573; proof of, 212.
- Waste, view in case of, 264; rule not to commit, pending error, &c. 357, 549, 567.
- Watchmen, attorney privileged from being, 31.
- Wife, *see* "*Husband and wife*."
- Will, of realty, how proved, 241; proof of, where it remains in Chancery, 234; of personality, proved by probate, 235; in fraud of creditors, void, &c. 669, 672.
- Withdrawing a juror, 282; costs on, 282.
- Withdrawing pleas not allowed, without leave, 210; plaintiff may sign judgment in case of, 210, 205; replication, 213; in replevin, 591; withdrawing pleas by executor, &c. 664.
- Withdrawing record, 273.
- Witnesses, in an action, what necessary, *see* "*Evidence*;" on writ of inquiry, 517; subpœna of, 245; subpœna duces tecum, 246; how served, &c., 246; how to be obeyed, 246; habeas corpus ad testificandum, 247; where witness a prisoner, 247; privilege from arrest, 247, 114, 115; penalty and consequences of not obeying subpœna, 247, 248; attachment, &c. for, 248; expenses of, 248; what extra expenses allowed, 249; tender of, 249; examination of, on interrogatories, 249, 250, *see* "*Interrogatories*;" how examined, 277; order of, 277; leading questions, 277; when allowed, 277; examination on *voire dire*, 278; examination as to competency, 278; questions to criminate, &c., 278; release of, to restore competency, 279; recent enactment as to allowing interested witness to be examined, *Addenda to* 279; witness to speak only to facts in his own knowledge, 279; not allowed to read testimony, 279; when may refresh memory, 279; when may give opinion in questions of science, &c., 279; party not allowed to contradict his own witness, &c., 279; when otherwise, 279; examination of witnesses separately, 280; when witness or-

- dered to withdraw, 280; cross-examination, 280; re-examination, 280; putting off trial for absence of, 797, 798; new trial for absence, &c. of, 818; new trial for perjury, &c. of, 818.
- Witnesses on an arbitration, 911, 912.
- Witness, to assignment of bail bond, 139; bail cannot be a witness, until his name be struck out of the bail piece, 428; may be struck out, 428, 429; becoming interested, need not be called, 240.
- Women, *see* "*Baron and Feme*;" cannot serve in general on juries, 290; seizure of goods of, when cohabiting with defendant, 393.
- Worcester, direction of writs to, 98.
- Work and labour, affidavit of debt for, 89; *see* "*Attorney*."
- Writ, *custos brevium* must indorse on, the time of filing it, 11, 133; blank writs not to be sealed, &c., 13; sheriff not to execute writ until delivered, 15; return of, by sheriff, &c., 15, 133; rule or order to return, 131—135; attachment for not returning, 137; proof by, 52, 229, 230; calling on opposite party to admit, 228.
- of *capias* on mesne process, *see* "*Capias, Writ of*."
  - of *capias*, on final process, *see* "*Capias ad Satisfaciendum*."
  - of *capias* in *withernam*, 577, 579, 594.
  - of *distringas* on mesne process, *see* "*Distringas, Writ of*."
  - of error, 324, *see* "*Error, Writ of*."
  - of *exigi facias*, 704.
  - of *fieri facias*, *see* "*Fieri Facias*."
  - of inquiry, generally, 508, *see* "*Inquiry, Writ of*."
  - of possession, in ejectment, 553, 554.
  - of privilege, 69.
  - *de proprietate probanda*, 577.
  - of protection, 114.
  - of *replegiari facias*, 1, 577.
  - *de retorno habendo*, 584, 585, 594.
  - of second deliverance, 584, 590, 594.
  - of summons on mesne process, *see* "*Summons, Writ of*."
  - of *venditioni exponas*, *see* "*Venditioni Exponas*."
  - of *venire facias juratores*, 257, *see* "*Jury Process*."
- Writings, not under seal, how proved, &c., 242, *see* "*Evidence*;" not seizable in execution, 392.

## Y.

- Year, *see* "*Time*;" computation of, 599; affidavit of debt only in force for, 93; statement of, in *capias*, 105; in summons, 445; plaintiff must declare in, 186; suing out execution in, 374, 599; *scire facias* to revive judgment after, 599.
- Yeoman of guard, when privileged from arrest, 65.
- York, direction of writs to, 98; registry of judgment to bind lands in, 324.

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